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FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

FRED B. SHELTON, III and JOHN PAUL JONES,
Petitioners,

v.

CITY OF COLLEGE STATION, AL MAYO, MERLE BAILEY, VIOLETTA BURKE, PATRICIA BOUGHTON and JACK UPHAM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether decisions of an appointed administrative agency charged with administering a local zoning ordinance are to be shown the same deference traditionally reserved for acts of legislative bodies where the agency in question has no legislative authority but rather issues decisions on case specific facts after an adjudicative hearing.

2. Whether a claim of substantive due process violations by an appointed administrative agency having no legislative authority can be defeated by a reviewing court's hypothesizing an "at least debatable" reason for the agency's actions even though the record before the reviewing court contains evidence that the agency's decisions were arbitrary and discriminatory.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Fred B. Shelton, III and John Paul Jones, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 6, 1986.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals which appears as Appendix A hereto is reported at 780 F.2d 475 (1986).

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* The caption of the case in this Court contains the names of all the parties.

The panel opinion of the Court of Appeals which appears as Appendix B hereto is reported at 754 F.2d 1251 (1985).

The findings of fact and conclusions of law issued orally from the bench by the District Court for the Southern District of Texas on October 14, 1983 are not reported. They appear as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 6, 1986. On March 17, 1986, Justice White signed an order extending the time for filing this petition for certiorari to and including May 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Tex. Rev. Civ. Stat. Ann. art. 1011g (Vernon 1963 & Supp. 1986) (Appendix E).

Zoning Ordinance No. 850 of the City of College Station, Texas (Appendix F).

STATEMENT OF THE CASE

Zoning Ordinance No. 850 of the City of College Station, Texas requires businesses to furnish a minimum number of offstreet parking spaces based upon criteria set out in the ordinance. Under the ordinance, the City's Zoning Board of Adjustment ("ZBA") has final authority to act on applications for "variances," i.e., waivers of the required minimum number of offstreet parking spaces

"where owing to unique and special conditions of the land not normally found in like districts a strict enforcement of the provisions of the ordinance . . . would result in unnecessary hardship. . . ." App. F at p. 68a.

After four unsuccessful attempts to secure a variance from the offstreet parking request, (without which they could not legally operate their business), petitioners Shelton and Jones brought the instant action in a federal court in the Southern District of Texas. Pleading violations of 42 U.S.C. § 1983 and of their rights to procedural and substantive due process, petitioners alleged and presented proof through deposition testimony, affidavits and documents that the denial of their request for a variance was arbitrary and discriminatory. Nevertheless, the District Court granted Respondent's Motion for Summary Judgment. On appeal, a panel of the Court of Appeals reversed as to petitioners' substantive due process claims. The panel found:

> [T]he factual showing in the record raises a genuine disputed issue of material fact, i.e., whether the [ZBA] acted arbitrarily and discriminatorily in denying the plaintiffs' application for a parking variance but granting or permitting it as to almost all other businesses in the area, including to the successor to the plaintiffs' interest in the identical property for which they themselves had unsuccessfully sought a parking variance.

App. B at p. 42a. Thereafter, the Court of Appeals granted rehearing *en banc*, and in a 10-5 decision affirmed the District Court's grant of a summary judgment.

The *en banc* Court's majority opinion held that because the Court's hypothesized reason for the ZBA's denying petitioners' request for a variance was "at least debatable,"

petitioners suffered no denial of substantive due process as a matter of law. Five judges dissented, arguing that:

> The constitutionality of the quasi-judicial action of an administrative agency is not reviewed with the deference given legislative enactments, and the actions of such a board are not sanitized by post-hoc conjecture concerning the factual determinations it might conceivably have made.

App. A at p. 27a.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS THAT REVIEW ZONING VARIANCE AND BUILDING PERMIT DETERMINATIONS BY STATE AND LOCAL ADMINISTRATIVE AGENCIES UNDER A TRADITIONAL SUBSTANTIVE DUE PROCESS ANALYSIS, IN THAT THE FIFTH CIRCUIT HAS NOW CHARACTERIZED THESE ADMINISTRATIVE DETERMINATIONS AS "QUASI-LEGISLATIVE" AND HELD THAT THEY ARE TO BE GIVEN THE DEFERENCE HERETOFORE RESERVED FOR PRONOUNCEMENTS OF LEGISLATIVE BODIES ANSWERABLE TO THE ELECTORATE.

Zoning in College Station is governed by Zoning Ordinance No. 850, in which the City, pursuant to Tex. Rev. Civ. Stat. Ann. art. 1011g (Vernon 1963 & Supp. 1986), created a Zoning Board of Adjustment. When it established the ZBA, the College Station City Council empowered it to make "special exceptions to the terms of [the] Zoning Ordinance in harmony with its general purpose and intent and in accordance with general and specific rules . . .". (Zoning Ordinance No. 850 § 11-A). These

exceptions or "variances" are granted only if four of five sitting ZBA members vote in favor of the variance. The ZBA members are appointed by the City Council and serve at the Council's pleasure. Decisions of the ZBA are the final decision of the City of College Station and are not subject to review by City Council. (Zoning Ordinance No. 850 § 11-H, 12-D).[1] Texas case law has firmly established that, unlike a city council or county commissioners court, a municipal zoning board of adjustment, which is a creature of state law, has no power to legislate; rather, it acts only in a quasi-judicial capacity. *Board of Adjustment of City of San Antonio v. Willie*, 511 S.W.2d 591, 593 (Tex. Civ. App. — San Antonio 1974 writ ref'd n.r.e.). The Court of Appeals chose to ignore this established Texas case law construing the powers of the ZBA and characterized the ZBA as performing a "quasi-legislative" function in determining whether or not to grant variances from duly promulgated zoning ordinances. As the dissent aptly pointed out:

> What is at stake in labeling a decision legislative or quasi-legislative rather than quasi-judicial is more than a linguistic nicety. A legislative enactment is entitled to deference when reviewed by the judicial branch, and must be accorded "great weight" when its constitutionality is questioned. A similar degree of judicial deference is appropriate when local governments exercise their zoning powers, and the decisions of local legislatures to zone or to rezone are entitled to a "presumption of validity."

---

1. Under Texas law, persons aggrieved by a decision of the ZBA may appeal solely to the courts for redress of their grievances. (Zoning Ordinance No. 850 § 11-H; Tex. Rev. Civ. Stat. Ann. art. 1011g (j)-(n) (Vernon 1963 & Supp. 1986).

> Administrative or quasi-judicial decisions of a local zoning board are different. The appropriate standard by which the constitutionality of such a board's action is reviewed requires that we ask whether the action "is arbitrary and capricious, having no substantial relation to the general welfare."

App. A at pp. 33a-34a. (footnotes omitted)

The *en banc* majority opinion specifically rejected the panel's approach to this case which was to focus upon record facts. In the words of the *en banc* majority:

> [The panel's] focus was upon record facts. Significantly it found unresolved issues of material fact from the affidavits, and from the sworn testimony of Shelton, Jones, the members of the Zoning Board, and the city manager, all of whom would presumably have testified at the ordered trial.
>
> This approach is at odds with constitutional review of a legislative act.

App. A at p. 13a.

Relying on *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.) (*en banc*), *cert. denied* 419 U.S. 837 (1974), the majority characterized the ZBA's decision on petitioners' request for a variance as "quasi-legislative" and therefore entitled to great deference. Yet *Pruitt* did not concern review of a decision of an appointed administrative agency such as the ZBA which was required by statute to hold an adjudicative hearing before taking action; it involved the review of rezoning activities of a county commissioner's court, a Texas legislative body empowered to enact and amend geographic zoning plans, which is elected by and responsible to the electorate.

By extending the characterization of "quasi-legislative" to the College Station ZBA and thereafter utilizing that

quasi-legislative characterization as a justification for judicial deference to the ZBA's decisions on case specific adjudicative determinations, the Fifth Circuit has come into conflict with most of the other circuits that have ruled on the issue. The Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits have held that a substantive due process claim can be made out based on an arbitrary, capricious or illegal denial of a land use permit. Thus in *Rogin v. Bensalem Township,* 616 F.2d 680, 689-90 (3rd Cir. 1980), *cert. denied,* 450 U.S. 1029 (1981), the Court of Appeals for the Third Circuit held that a substantive due process claim may be based on a building permit denial. Although ruling against the plaintiff on the merits, the Court of Appeals analyzed the facts to determine whether the denial of the permits was arbitrary or capricious and therefore violative of substantive due process. The Fourth Circuit in *Scott v. Greenville County,* 716 F.2d 1409, 1419 (4th Cir. 1983), held that a fourteenth amendment claim was properly stated where "there is fairly alleged a basis for finding either 'abuse of discretion [or] caprice in [a] zoning administrator's refusal to issue' a building permit . . .". The Sixth Circuit has held that the denial of a license because of bias and the desire to avoid competition violates a property owner's substantive due process rights. *Wilkerson v. Johnson,* 699 F.2d 325, 328 (6th Cir. 1983). The Seventh Circuit has recognized that an arbitrary denial of a building permit may be the basis for a § 1983 action. *Scudder v. Town of Greendale,* 704 F.2d 999, 1002 (7th Cir. 1983).

The Eleventh Circuit in *Southern Cooperative Development Fund v. Driggers,* 696 F.2d 1347 (11th Cir.), *cert. denied,* 463 U.S. 1208 (1983) distinguished between

a legislative zoning function and the application or enforcement of such legislation by the administrator so charged:

> The plaintiffs do not challenge the exercise of legislative function by Manatee County, or the validity or legality of the zoning ordinances. On the contrary, the plaintiffs urge that the Subdivision Regulations be applied as written. What we are called upon to decide is whether the Commission's actions were authorized as a matter of Florida law, and if so whether their actions were in violation of the Due Process clause of the Fourteenth Amendment.

696 F.2d at 1351. The Eleventh Circuit went on to hold in *Driggers* that the imposition of requirements not included in the zoning ordinance violated a permit applicant's substantive due process rights. The District of Columbia Circuit has also ruled consistently with the previously mentioned circuits. *Shenk v. Zoning Commission,* 440 F.2d 295, 297 (D.C. Cir. 1971).

In a recent decision containing a comprehensive review of all of the prior decisions of the circuits, the Eighth Circuit has held in *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986) that:

> [A]ppellants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily and imposed an unconstitutional condition on the granting of the [building] permit.

785 F.2d at 607. Ironically, the Eighth Circuit placed significant reliance on the panel decision in the instant case and concluded its review with the following:

> We are persuaded by the almost unanimous decisions of our sister circuits that the denial of a building permit under some circumstances may give rise to a substantive due process claim.

785 F.2d at 607.

Only the First Circuit, which has consistently held that a plaintiff fails to state a claim under 42 U.S.C. § 1983 when he alleges denial of a building permit even where the denial was malicious, in bad faith, and for invalid and illegal reasons, *see Chiplin Enterprises, Inc. v. City of Lebanon,* 712 F.2d 1524, 1526-28 (1st Cir. 1983) and now the Fifth Circuit by virtue of the *en banc* decision in the instant case have denied relief to the victims of arbitrary and capricious administrative action in the granting or denying of building permits and zoning variances.

Because of the importance of the issue and the polar positions taken by the circuits, these conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW EFFECTIVELY PRECLUDES MEANINGFUL JUDICIAL REVIEW OF ALL STATE AND LOCAL ADMINISTRATIVE AGENCY ACTIONS BY ALLOWING THE HYPOTHESIZING OF "AT LEAST DEBATABLE" GROUNDS FOR THE AGENCY'S ACTION RATHER THAN FOCUSING ON WHETHER A RATIONAL BASIS IN FACT EXISTED WHEN THE QUESTIONED ACTION WAS TAKEN.

While giving lip service to the "arbitrary and capricious" standard traditionally utilized in evaluating administrative agency actions in the face of a substantive due process claim, the majority opinion in fact abandons

this long standing mode of analysis in the instant case. The majority opinion distinguishes between what it characterizes as the "adjudicative model" and the "legislative model" of review of regulatory decisions. In the words of the Fifth Circuit majority:

> In reviewing a claim that a state has denied substantive due process by zoning property without a rational basis, a court could pursue either of two analytical tracks. A regulatory decision can be legislative or it can be adjudicative, and it will be reviewed differently depending on which category it is placed into.

App. A at p. 10a.

Holding that, because the ZBA's decision was made in the course of administration of a zoning ordinance, the ZBA's denial of a variance to petitioners is to be reviewed under the "legislative model," the *en banc* majority precludes any meaningful review:

> Entailed in the panel's conclusion that there are in this case issues of fact for a jury, is the further conclusion that a jury might properly find that there was a rational basis for the zoning decisions. Under the legislative model, which asks whether the factual question was at least debatable, the district court's grant of defendants' motion for summary judgment was *a fortiori* proper. Detailing the record evidence is therefore an unnecessary exercise.

App. A at p. 22a.

Yet as pointed out by the dissenters, the ZBA's function and power simply do not permit analogy to a legislative body:

> The Board of Adjustment created by the City of College Station, pursuant to Texas statutory authority, is typical of those found in most states. It bears no resemblance to a legislature. Its members are appointed, and, in the words of the statute, "may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent." The Board is empowered only to decide administrative matters and to authorize "upon appeal in specific cases" variances from the ordinance when it finds that, owing to special conditions, literal enforcement would result in unnecessary hardship to the party seeking a variance. The Board has no power to enact or to amend zoning classification plans, either on a municipality-wide or other geographic basis. The limited scope of the Board's authority requires it to analyze the circumstances of the particular zoning problem presented and to determine whether, for a specific property, an exception to the ordinance is warranted. The Board must hold a public hearing and give notice to the parties in interest. Its decisions, unlike those of a legislature or a city council, are subject to review by the Texas courts, which may affirm, modify or reverse the board's decision.

App. A at pp. 27a-28a. (footnotes omitted)

Thus by transforming a typical administrative agency adjudicative decision into a legislative pronouncement, the majority opinion effectively precludes review of such decisions notwithstanding the undisputed fact that proof exists in this record tending to establish the agency's arbitrary, capricious and discriminatory action resulting in the inability of petitioners to legally operate their business. This is so because, having determined to characterize the ZBA's decision as quasi-legislative, the majority

goes on to hold that "at least debatable" reasons for the agency's decisions may be "hypothesized," i.e. they may be reasons which the agency never in fact considered. As the dissenters note:

> The majority does not inquire whether the board in fact acted arbitrarily or capriciously but only whether its lawyer, or the court, can conjecture an after-the-fact basis for its decision. The proper question to ask when reviewing a non-legislative determination, however, is whether a rational basis *in fact* existed when the action was taken. No plaintiff will be able to overcome the "at least debatable" standard constructed by the majority. To do so, he would be required, by affidavit, to foreclose beyond dispute any possibility other than caprice and arbitrariness. Since this will be impossible when ex post facto conjecture will suffice, the property owner's right to due process will be consistently short-circuited by judgment as summary in operation as its name implies.

App. A at p. 36a. (footnote omitted)

There is no difference between the decisions of the ZBA of College Station, Texas and any other administrative agency created by a legislative body and charged with administering legislation by case specific decision making. Carried to its logical extreme, the *en banc* majority opinion would effectively insulate all such agency determinations from judicial review on substantive due process grounds by affording their essentially adjudicative decisions the great deference heretofore reserved for pronouncements of legislative bodies. This abdication of federal judicial responsibility in the face of serious substantive due process claims of arbitrary and discriminatory action by an administrative agency justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

By: _____

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May 6, 1986

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1986, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to William B. Butler, Esq., 4700 Texas Commerce Tower, Houston, Texas 77002, counsel for Respondents. I further certify that all parties required to be served have been served.

_____

STUART M. NELKIN

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2765

OPINION

FRED B. SHELTON, III and JOHN PAUL JONES,
Plaintiffs-Appellants Cross-Appellees,

v.

CITY OF COLLEGE STATION, et al.,
Defendants-Appellees Cross-Appellants.

Filed January 6, 1986

Before: Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Randall, Tate, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.

Opinion by Judge Patrick E. Higginbotham; Concurrence by Judge Hill; Dissent by Judges Rubin and Tate, joined by Judges Politz, Johnson and Williams.

Appeals from the United States District Court
for the Southern District of Texas
Norman W. Black, District Judge, Presiding

SUMMARY

Land Use/Constitutional Law

Appeal from grant of summary judgment for the City of College Station. Affirmed.

Shelton and Jones leased a building in the City in an area covered by a zoning ordinance requiring specified minimum numbers of off-street parking places for different types of businesses. The ordinance permitted the continued operation of non-conforming preexisting businesses. Shelton and Jones wanted to put a pool hall in their building. Variances to the parking space ordinance were denied. Shelton and Jones brought this suit alleging that by granting variances to other similarly situated businesses, the zoning board denied their substantive due process rights and that a denial of procedural due process resulted from the failure of board member Bailey to recuse himself from voting because his church opposed parking variances in the neighborhood in question. A panel of the Fifth Circuit affirmed the summary judgment as to the procedural due process claim but reversed the grant of summary judgment as to the substantive due process claim.

[1] Because the zoning board indisputably had available a rational basis for its zoning decision, it is not necessary to define the property right in question or to decide whether the state deprived Shelton and Jones of any property. [2] Zoning decisions are reviewed by the same constitutional standards employed to review statutes enacted by state legislatures. [3] Those challenging a legislative judgment must convince the court that the legislative facts on which the classification was based could not have reasonably been conceived to be true by the government decisionmaker. [4] A zoning ordinance is not unconstitutional unless it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. [5] The analysis is the same whether the ordinance attacked is one of general or specific application.

[6] The panel claimed to apply the deferential standard of the legislative model—whether the decisions were arbitrary and capricious—but in its analysis, it shifted to the adjudicative model by insisting upon trial-type proof of both the purpose of the zoning board decision and the rationality of its attainment. [7] This approach is at odds with constitutional review of a legislative act. [8] The confusion of the legislative and adjudicative models injects federal courts into matters historically the business of states and subject to their police power and would alter the decisional process for zoning issues. [9] The outside limit upon a state's exercise of its police power in zoning decisions is that there must be a rational basis.

[10] A state's use of an adjudication-like mechanism for zoning decisions does not by itself trigger a procedural due process inquiry or create protected property interests. Although a zoning decision can be justified by hypothesized purpose in the absence of triggering property rights, when such rights are affected, a later procedural due process inquiry might require a zoning board to point to a rational basis that was employed in reaching its decision. However, that question need not be decided here as such a requirement would indisputably have been met in this case.

[11] Although last term the U.S. Supreme Court used the rational basis test to strike down three legislative decisions, the full implications of those decisions for the deference to be given legislative acts are uncertain but essentially irrelevant to this case. [12] In none of the cases did the Court suggest that legislative purpose cannot be hypothesized. Even when the deprivation of a property right triggers procedural due process standards that may require a state agency to be able to point to a

rational basis employed in reaching its decision as opposed to a basis later hypothesized by others, nothing requires proof of the, as distinguished from a, basis of decision.

[13] Because it was undisputed that parking was a problem and it was indisputably rational for the board to conclude that Shelton and Jones's proposals could have added to the parking problem, the board's decisions denying the variances could not have been arbitrary on their own merits. [14] Under the legislative model which asks whether the factual question was at least debatable, the grant of summary judgment was a fortiori proper. [15] Reliance on the grant of other variances to show the board treated Shelton and Jones differently than other identically situated applicants is improper as in all three other variance cases, the board acted reasonably in determining these cases were unlike Shelton and Jones's. [16] Likewise, reliance on the city's passive enforcement policy is misplaced as it would not render irrational the denial of a request for a variance that would formally validate noncompliance with the ordinance.

[17] Bailey's mere membership in a church that also opposed the grant of the variance does not by itself establish bias, nor raise an issue as to an irrevocably closed mind that might justify his disqualification from the hearing.

The concurrence by a member of the original panel which heard this case states that the author is now persuaded that there was no substantive due process violation occurred by the board's decision. The dissent argues that the majority's opinion misconstrues both the character of the board's action and the court's role in reviewing such actions for compliance with fundamental constitutional guarantees.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We have long insisted that review of municipal zoning is within the domain of the states, the business of their own legislatures, agencies, and judiciaries, and should seldom be the concern of federal courts. A person disappointed with a zoning decision ordinarily can interest the federal courts only in a substantial claim that the state has deprived him of a property right without due process of law. In the absence of invidious discrimination, suspect classifying criteria, or infringement of fundamental interests, our review of these quasi-legislative decisions is confined to whether the decisions were "arbitrary and capricious." This requirement of substantive due process under the fourteenth amendment, as distinguished from its quite different meaning under certain state laws and under the federal Administrative Procedure Act, is met if there was any conceivable rational basis for the zoning decision. *Vance v. Bradley*, 440 U.S. 93 (1979). Persuaded that there was no genuine issue of material fact and that there was a rational basis for the zoning decision in the case at bar, we affirm the district court's grant of summary judgment for the City.

I

In 1979, Fred B. Shelton, III and John Paul Jones leased a building at 403 University Drive in College Station, Texas. The building is located in the Northgate area, an older commercial district directly adjacent to the campus of Texas A & M University, which is con-

ceded to have the worst parking and traffic problems in the city.

Years before, the city had passed a zoning ordinance requiring specified minimum numbers of off-street parking spaces for different types of businesses. Few, if any, of the existing Northgate businesses would have been able to meet the parking requirements, and the ordinance permitted the continued operation of nonconforming preexisting businesses. The ordinance provided that the parking requirements would have to be met if a business built a new building or increased its capacity, or if it changed its business to require more parking than the existing nonconforming use.

Shelton and Jones's building had previously housed a photography studio. When Shelton and Jones applied for a building permit to remodel the structure for use as a pool hall and tavern, city officials informed them that they would have to either provide the number of off-street spaces required for that use or obtain a variance from the Zoning Board of Adjustment. The two applied for a variance in August 1979. After debate over the amount of drive-in traffic the business would attract and over whether the pool hall's peak hours were the same as those of other area businesses, the Zoning Board on August 14, 1979 rejected the request by a 1-3 vote.

In an effort to satisfy the board's expressed concerns about parking, Shelton and Jones leased space in a lot some 800 feet from their building. This did not satisfy the ordinance's requirement that parking space be owned and within 200 feet of the proposed use, and Shelton and Jones twice more requested variances. The variances were denied on September 10, 1979 and October 20, 1979 respectively. Although the Zoning Board voted 3-2

in favor of each request, the ordinance required four affirmative votes before a variance could be granted. Finally, Shelton and Jones sought a variance for use of the property as a video arcade rather than as a pool hall. The board again debated whether the arcade would attract primarily drive-in or walk-in traffic, and on January 15, 1980 rejected this fourth request by another vote of only 3-2 in favor.

Although Texas law gave Shelton and Jones a right to substantive review by a state court of the denials by the Zoning Board of the requested variance, *see* Tex. Rev. Civ. Stat. Ann. art. 1011g (Vernon Supp. 1985); *Swain v. Board of Adjustment*, 433 S.W.2d 727 (Tex. Civ. App.—Dallas 1968, writ dism'd w.o.j.), they never sought relief in the state courts. Rather, after approximately twenty months, they sued the zoning officials and the city in federal district court seeking money damages. They complained that a little more than a year after denying their last request, the board granted variances to assertedly similarly situated businesses and thus "denied [their] substantive due process rights." Shelton and Jones also alleged a denial of procedural due process in the failure of board member Murl Bailey to recuse himself from voting because his church, concerned that church parking would be reduced, opposed parking variances in the Northgate neighborhood.

Defendants moved for summary judgment based on their own affidavits, the minutes of the board meetings involving Shelton and Jones's requests, and the depositions of Jones and Shelton. Shelton and Jones, in opposition, submitted the minutes of board meetings where other businesses received variances. They also attached defendants' depositions, and pointed to planning director

Al Mayo's statement that most existing Northgate businesses, including some that began operating after the zoning ordinance took effect, were not meeting the parking requirements, and that the city was not enforcing the parking rules against those other businesses. The defendants responded by citing the facts, relied on by the board in granting variances, that had made the other variance recipients less likely to generate additional parking problems than Shelton and Jones's proposed uses; they argued that any nonenforcement of the ordinance by city building officials was irrelevant to the board's decisions to grant or deny variances legalizing noncompliance.

After briefing and oral argument, the district court granted summary judgment for the defendants on both the substantive and the procedural due process claims. The court relied on *Couf v. DeBlaker,* 652 F.2d 585 (5th Cir. 1981), *cert. denied,* 455 U.S. 921 (1982), and *South Gwinnett Venture v. Pruitt,* 491 F.2d 5 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 837 (1974), in holding that its review was confined to whether the zoning decisions were arbitrary and capricious. Although finding that there might be some "inferences," "allegations," and a "scintilla of evidence" in the record, the court concluded that "there [was] no evidence that the refusal to grant the variance in this case was arbitrary and capricious." On the procedural due process count, the court quoted *Couf's* holding that local zoning decisions were legislative in nature and governed only by limitations on legislative procedure, and that even actual bias on one decisionmaker's part would not violate procedural due process in such situations.

A panel of our court affirmed the summary judgment as to the procedural due process claim, but reversed the

grant of summary judgment as to the claim of substantive due process, finding that "a genuine dispute of material fact is demonstrated as to whether the seemingly arbitrary denials of the parking variance were reasonably based on fact." 754 F.2d at 1256 (5th Cir. 1985). Shelton and Jones urge that they also claimed that the board's later grants of variances on assertedly similar facts was a denial of equal protection. We do not hereafter separately focus upon this claimed denial of equal protection. We conclude that there was a rational basis for the legislative decisions. The classifications were therefore valid, and we need not address other asserted deficiencies.

II

- 1 -

Deprivation by the state of a protected interest in life, liberty, or property is prerequisite to a claim for denial of due process. The property interest asserted in this case was a right under state law to seek a variance from an otherwise valid restriction of use.

It is not at all clear that the state has deprived Shelton and Jones of such a property right. The University Drive real estate was subject to an ordinance that required a certain amount of parking for its use. Shelton and Jones did not attack the ordinance or its restriction upon their use of the property. The state gave a "right" to seek a variance, which included review of the Zoning Board's decision by a state district court. It can be argued that because Shelton and Jones bypassed this state-furnished remedy, the state did not deprive them of any property, at least to the extent that the ignored remedy was a part of the protected property interest.

[1] Shelton and Jones reply that this argument rests on an overly narrow view of their propery. They argue that, viewed in more general terms, use of their property has been restricted and that arbitrarily refusing the requested variances deprived them not only of the state-conferred right to seek a variance, but also of the underlying use of property. Because we conclude that the Zoning Board indisputably had available a rational basis for its zoning decision, we do not today undertake the task of defining the property right in question or deciding the related question of whether the state has deprived Shelton and Jones of any property.

[2] In reviewing a claim that a state has denied substantive due process by zoning property without a rational basis, a court could pursue either of two analytical tracks. A regulatory decision can be legislative or it can be adjudicative, and it will be reviewed differently depending on which category it is placed into. Our characterization of zoning decisions as "quasi-legislative," *South Gwinnett Venture v. Pruitt,* 491 F.2d 5, 7 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 837 (1974), might suggest ambivalence in our choice between these two tracks. Such a suggestion of uncertainty is not warranted. We have plainly and consistently held that zoning decisions are to be reviewed by federal courts by the same constitutional standards we employ to review statutes enacted by the state legislatures.

The most obvious difference between the two tracks is in how the judiciary reviews the facts behind the decision at issue. In the adjudicative model, historical facts are determined by judge or jury and thereafter are to be accepted unless unsupported by adequate evidence found within a defined record. In general, historical facts in

the adjudicative model are case specific—for example, the speed of a car or the condition of a roadway.

[3] Review of legislative facts is quite different. "In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. . . . [H]owever, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979).

[4] Attacks against zoning plans invoke the legislative model and have only rarely been sustained. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. Cambridge*, 277 U.S. 183 (1928).[1] *Euclid* and *Nectow* held that an ordinance was not to be declared unconstitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See Moore v. East Cleveland*, 431 U.S. 494, 498 n.6 (1977) (plurality opinion). Justice Stevens, whose concurring vote was necessary to constitute the 5-4 majority in *Moore*, expressly reaffirmed these deferential standards. *Id.*, 431 U.S. at 520-21; *see also Village of Belle Terre v. Boraas*, 416 U.S. 1 (1978).

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1. *Nectow*, which expressly reaffirmed the general standard of review set out in *Euclid v. Ambler Realty Co.*, held that the zoning decision in that case bore no "substantial relation to the public health, safety, morals, or general welfare." *Nectow*, 277 U.S. at 188. In reaching this conclusion, the Supreme Court relied on the findings of a *state* court and in no way intimated that federal courts are free to "substitut[e] [their] judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining [zoning] question[s]." *Id.*

Although *Euclid* and *Moore* were frontal attacks on zoining ordinances rather than attacks on their specific application, the Court has also, and more recently, treated the denial of a variance in a specific zoning case as a legislative act. In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), a Chicago suburb refused to grant a zoning change from single family to multiple-family dwelling. In elaborating the proof requirements of *Washington v. Davis*, 426 U.S. 229 (1976), handed down the previous term, the Court's analysis of the requirements for proving discriminatory purpose relied upon the legislative model. Indeed, the labor of the *Arlington Heights* opinion was to accommodate proof of racial purpose with the deference that must be shown toward the legislative process. Similarly, this court has remained on the legislative track when turning from a frontal attack on an ordinance or plan itself to a specific zoning decision. *See Blackman v. City of Big Sandy*, 507 F.2d 935, 936 (5th Cir. 1975); *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 837 (1974); *Higginbotham v. Barrett*, 473 F.2d 745, 747 (5th Cir. 1973). *Cf. Stansbery v. Holmes*, 613 F.2d 1285, 1288 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980).

[5] Nothing internal to the legislative model impedes its application to a specific zoning decision. The inquiry remains the same: was there a conceivable factual basis for the specific decision made? Whether courts will insist that support for such a regulatory decision take the form of proven historical facts or hypothesized legislative facts is not a function of whether the ordinance attacked is one of general or specific application. Rather, opting for the adjudicative track of analysis is virtually a direct proxy

for deciding to review the legislative process rather than the rationality of the legislative result. This must be true unless there is an *a priori* basis, as we think there is not, for distinguishing legislative from adjudicative acts.

The script of the trial ordered by the panel in this case illustrates how its sharp move toward an adjudicative model would directly affect the structure of the state-created process for deciding zoning questions. The recording of evidence and its sources by the Zoning Board would become more important. The knowledge of the members of the board would, we must expect, be determined from the "record evidence." Their role would change from that of deciding the best course for the community to adjudicating the rights of contending petitioners. In other words, the effect of the panel decision would have been to move the function of a member of the Zoning Board from that of legislator toward that of judge.

[6] We are confident that the panel did not intend this result. It claimed to apply the deferential standard of the legislative model—whether the zoning decisions were arbitrary and capricious—but in its analysis it shifted to the adjudicative model by insisting upon trial-type proof of both *the* purpose, or basis, of the Zoning Board decision and the rationality of its attainment. Its focus was upon record facts. Significantly, it found unresolved issues of material fact from the affidavits, and from the sworn testimony of Shelton, Jones, the members of the Zoning Board, and the city manager, all of whom would presumably have testified at the ordered trial.

[7] This approach is at odds with constitutional review of a legislative act. Justice Powell explained part

of the problem in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 n.18 (1976):

> This Court has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The problems involved have prompted a good deal of scholarly commentary. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 356-361 (1949); A. Bickel, The Least Dangerous Branch 208-221 (1962); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); Brest, [*Palmer v. Thompson:* An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 116-18].

Although there have been suggestions that defense of a legislative decision ought to rest on articulated rather than hypothesized purposes, *see, e.g., McGinnis v. Royster*, 410 U.S. 263 (1973); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protecion*, 86 Harv. L. Rev. 1 (1972), the panel in the case at bar went even further in that its ordered trial would have required proof of the actual purpose. Not only did the Zoning Board articulate a rational basis that was indisputably related to the general welfare, there was no question but that the articulated basis was a basis for decision. The trial ordered by the panel confounds its attempt to apply the proper standard of review of a legislative act.

[8] Such confusion of the legislative and adjudicative models has two cardinal flaws. By sharply cutting the deference due state decisions, it would inject federal courts into matters historically the business of states and subject to their police power. It would, more specifically, alter the decisional processes for zoning issues. The difference between an inquiry into whether there was any possible rational basis for legislation and an inquiry into the actual basis of legislation is significant. A court's assumption of the power to decide between competing legislative proposals or to require the state to prove the validity of its choice is quickly the right to change the legislative process itself. Gunther, *supra.* As the Supreme Court observed in *McGinnis v. Royster,* 410 U.S. 263, 276-77 (1973):

> The search for legislative purpose is often elusive enough, *Palmer v. Thompson,* 403 U.S. 217 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute.

That a state may choose to make a legislative decision by a process that resembles adjudication is not our immediate concern.[2] Our question is whether anything in

2. The manner in which a state chooses to separate and delegate governmental power under state law is ordinarily not a matter of concern under the U.S. Constitution. *See* 1 N. Singer, Sutherland Statutory Construction § 3.02 (Sands 4th ed. 1985) ("The guarantee of a republican form of government by the federal constitution does not impose the doctrine of separation of powers upon the states, so that without the adoption of the rule by a state itself there is no requirement of separation of powers in state government." (footnote omitted)); *see also Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 461 n.6 (1981) ("[T]he states are free to allocate the law-making function to whatever branch of state government they may

the fourteenth amendment requires it to do so. We have consistently said "no" to that question and we do so again today.

[9] We hold that the outside limit upon a state's exercise of its police power in zoning decisions is that they must have a rational basis. The dissent would expand this traditional fourteenth amendment standard by holding that if a state sometimes chooses to exercise its zoning power in a manner that more resembles adjudication than legislation, the Constitution imposes new and greater constraints upon its exercise of the police power. Apparently, this new limit on the state's police power would, in part, take the form of allowing a federal trier of fact to set aside a zoning decision that it believed was somehow arbitrary and capricious, even if there was not only a conceivable rational basis for the decision but also an articulated basis that was indisputably rational. We reject this proposal. The states are free to make zoning decisions in what the dissent labels a "quasi-judicial" manner. But neither the Supreme Court nor this court has ever suggested that such a choice by the state works a metamorphosis of the Constitution's demand for minimum rationality. Aware of no good reason to alter settled constitutional law, we decline to set out on the path proposed by the dissent.

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choose." (citations omitted)); *Ohio v. Akron Metro. Park Dist.*, 281 U.S. 74, 79-80 (1930) ("As to the guaranty to every State of a republican form of government (Sec. 4. Art. IV), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress and not the courts." (citations omitted)). "The due process clause of the Fourteenth Amendment, likewise, neither requires separation of state powers nor prohibits their delegation." 1 N. Singer, *supra*, § 4.04 (footnote omitted). *See also New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 104-08 (1978) (due process clause leaves the states wide discretion to experiment with administrative mechanisms that regulate commercial enterprises).

[10] As one turns from a frontal attack on a zoning ordinance to a specific zoning decision, it is true that there is a greater likelihood of encountering protected property interests, which can trigger a procedural due process inquiry. But a state's use of an adjudication-like mechanism for zoning decisions does not by itself trigger such an inquiry or create such property rights. In any event, judicial enforcement of the Constitution's procedural minima in such cases intrudes upon the legislative process in a way that is quite different from the intrusion that accompanies a failure properly to apply the legislative model. It is one thing for federal courts to insist upon procedural rights such as fair notice and quite another to measure the relative probative force and substantive content of the resulting zoning decision. A governmental body conducting a zoning hearing might well be required by the due process clause to give notice, and perhaps certain participatory rights, to affected property owners. Although we hold that a zoning decision can be justified by hypothesized purposes in the absence of such triggering property rights, we acknowledge that when such rights are affected, a later procedural due process inquiry might require a zoning board to point to *a* rational basis that was employed in reaching its decision. We need not decide this question today because such a requirement would indisputably have been met in this case, as the dissent appears to concede by declining to assert a violation of procedural due process. The dissent would nonetheless impose additional procedural requirements as a *substantive* matter. This ill-defined insistence on facilitating federal judicial review would effectively make compliance with the Administrative Procedure Act, or rather with some extreme interpretation of that statute, a constitutional rquirement. We dcline

to adopt such a strained expansion of the meaning of the fourteenth amendment.

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Given the legislative or quasi-legislative nature of zoning decisions, their review by federal courts is quite different from the review to which they may be subjected by state courts. *See, e.g., Fleming v. City of Tacoma,* 81 Wash. 2d 292, 502 P.2d 327 (1972) (rezoning amendments are subject to review under Washington "appearance of fairness" doctrine). It is also very different from the review of certain federal administrative actions, where, by statute, a decision must be overturned if not supported by "substantial evidence" on the record. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 103 S. Ct. 2856, 2866-67 (1983). Unlike such schemes for administrative review, federal judicial interference with a state zoning board's quasi-legislative decisions, like invalidation of legislation for "irrationality" or "arbitrariness," is proper only if the governmental body could have had no legitimate reason for its decision. *See, e.g., Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464 (1981); *Vance v. Bradley,* 440 U.S. 93, 111 (1979).

This standard, though not always fully elaborated, has in practice been uniformly followed in zoning cases. *Compare South Gwinnett Venture,* 491 F.2d at 7; *Burns v. City of Des Peres,* 534 F.2d 103 (8th Cir.), *cert. denied,* 429 U.S. 861 (1976); and *Lakeside Community Hosp. v. Tahoe Regional Planning Agency,* 461 F. Supp. 1150, 1155-56 (D. Nev. 1978), all basing their rejection of claims of arbitrary denials of rezoning on the zoning authority's articulation of reasons for its decision, *with Shenk v. Zoning Comm'n,* 440 F.2d 295 (D.C. Cir.

1971); and *Scott v. Greenville County*, 716 F.2d 1409, 1419-21 (4th Cir. 1983), sustaining arbitrariness complaints after the zoning authority could offer no legitimate ground at all for its act.

We do not suggest that a zoning decision can be justified by mouthing an irrational basis for an otherwise arbitrary decision. A denial of a building permit on the King Ranch because of inadequate parking might fall into this category. The key inquiry is whether the question is "at least debatable." *See Clover Leaf Creamery*, 449 U.S. at 464. If it is, there is no denial of substantive due process as a matter of federal constitutional law.

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[11] We pause here to note that last term the Supreme Court used the rational basis test to strike down three legislative decisions. *See City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985) (Texas municipality's decision to bar a proposed home for the mentally retarded); *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676 (1985) (Alabama insurance tax favoring resident insurers); *Williams v. Vermont*, 105 S. Ct. 2465 (1985) (residents-only exemption from the Vermont use tax on cars purchased out of state). The full implications of these three decisions for the deference to be given legislative acts are uncertain but essentially irrelevant to this case.

In *Ward* the Court expressly declined to decide whether there was a rational relationship between the legislative purposes and the tax differential, 105 S. Ct. at 1680, but it observed that in equal protection analysis a rational relationship between a legitimate purpose and the resulting legislation "is not difficult to establish" and the ques-

tion of rational relationship need only be "at least debatable." *Id.* at 1683 (citations omitted). The Court confined its review to the legitimacy of the proffered legislative purposes themselves. In the case at bar, there is no contention that traffic control was not a legitimate purpose of the zoning decision. The only question here is whether the denial of a zoning variance "at least debatably" served the purpose of traffic control.

The *Williams* Court concluded that the buyer's residence at the time of purchase was not a rational basis for imposing different tax obligations on cars purchased outside and then brought into the state. The Court, examining the face of the statute, could find "no relevant difference" between the two groups of taxpayers, and held only that it was improper to dismiss the action, for failure to state a claim, before an answer was filed. 105 S. Ct. at 2474. As we show below, there are such "relevant differences" in the case at bar.

In *City of Cleburne* the Court reviewed the several proffered legislative reasons for the requirement that a home for retarded persons, but not other similar residences such as dormitories, obtain a special-use permit. It found each explanation internally contradictory or absurd, and concluded that the ordinance must have "rest[ed] on an irrational prejudice against the mentally retarded. . . ." 105 S. Ct. at 3260. As we show below, no such conclusion is necessary in the case at bar.

[12] Significantly, in none of these cases did the Court suggest that legislative purpose cannot be hypothesized. Implicit in all three was the Court's acceptance of the principles that the legislature or other governing body need not express all its purposes when it acts and that the

defendant in a constitutional case need not prove the legislative purpose as a historical fact. Far from treating the question of rationality as a historical fact necessarily subject to evidentiary procedures and findings of a trial court, the Court in each case looked for a conceivable rational basis for the implicit judgment of the governing body that its legislative purpose was served by its decision. Even when the deprivation of a property right triggers procedural due process standards that may require a state agency to be able to point to a rational basis employed in reaching its decision, as opposed to a basis later hypothesized by others, nothing requires proof of *the*, as distinguished from *a*, basis of decision.

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[13] Much of Shelton and Jones's energy, both below and in this court, has been devoted to arguing that their proposed businesses would not have exacerbated College Station's parking problems—they have suggested, for example, that their businesses would have attracted mostly walk-in traffic. Under the correct standard of review, we cannot reach such questions. Not only was the control of parking and traffic congestion a legitimate purpose, it is undisputed that parking was a problem. It was also indisputably rational for the board to conclude that Shelton and Jones's proposals could have added to the parking problem. It follows that the board's decisions denying the variances cannot have been arbitrary on their own merits. Indeed, Shelton conceded in his deposition that it was "reasonable" for people to disagree as to how many customers would have driven to his business, and Jones could not say that there was "not room for any difference of opinion" on his and Shelton's requests for variances.

[14] Entailed in the panel's conclusion that there are in this case issues of fact for a jury, is the further conclusion that a jury might properly find that there was a rational basis for the zoning decisions. Under the legislative model, which asks whether the factual question was at least debatable, the district court's grant of defendants' motion for summary judgment was *a fortiori* proper. Detailing the record evidence is therefore an unnecessary exercise. We turn nonetheless to that record because plaintiffs persuaded a panel of our court that there was an issue of fact for trial and because the appropriate analysis of the factual background of this case may be instructive.

[15] Shelton and Jones rely primarily on three variances, all granted more than one year after the denial of their last request, as evidence that the Zoning Board treated them differently from identically situated applicants. The first was granted on January 16, 1981, a year after the board had denied plaintiff's last zoning request, to Michael Flowers and Stephen Larson, who had subleased Shelton and Jones's premises at 403 University Drive to operate a restaurant. The minutes of the meeting where that variance was granted show that board member Jack Upham, a defendant here, "pointed out that the prior variance requests were for a different type of business," and "stated that the restaurant business was more competitive than those businesses proposed in earlier requests, and that walk-in business would be more likely at a restaurant." The board thus had before it a parking-related reason for distinguishing between the request of Flowers and Larson and that of Shelton and Jones.

Whether a restaurant would draw more pedestrian customers in 1981 than a pool hall or arcade would have drawn a year earlier is at least debatable.

Shelton and Jones also point to a variance granted on April 21, 1981 to Johnny Lampo, the owner of Pizza Hut at 501 University Drive, conditioned on Lampo's acquiring leased parking space. Lampo leased three spaces in the same lot that Shelton and Jones had unsuccessfully sought board approval to use. Minutes of the Zoning Board record recite that the board was persuaded that Lampo needed additional parking only for his employees, while Shelton and Jones had planned to have customers park in the distant leased lot. Whatever its ultimate validity, this was certainly a rational basis for the decision. The board could reasonably have concluded that employees would be more likely than customers to use a distant lot.

The third cited variance was granted to Ed Walsh on July 21, 1981 for a video arcade at 315 University Drive. Walsh also leased the requisite parking space, but it is undisputed that his spaces were immediately behind his business, rather than 800 feet away, as with Shelton and Jones's lot. Even so, the board initially turned down Walsh's request, and approved only a one-year variance subject to board review at year's end. The board's action here, far from being arbitrary, demonstrates a serious concern about parking entirely consistent with its treatment of Shelton and Jones.

[16] In addition, Shelton and Jones cite the deposition testimony of city planner Al Mayo that most Northgate businesses were not supplying the amount of parking space required by the ordinance, and that some of these

businesses began operations after the ordinance took effect. Shelton and Jones argued below that "no enforcement in the past . . . is the same a a de facto variance," and urge here that because of the city's lax enforcement, the denials of their variance requests were arbitrary. We disagree. The undisputed evidence is that the city declined to independently inspect any operating businesses for compliance with the ordinance, and instead acted only upon citizen complaints or when businesses sought permission to remodel or expand, as Shelton and Jones did. There is no basis for concluding that this passive enforcement policy reflected city approval of existing violations, or that a business whose noncompliance did come to the city's attention would be ignored. Quite to the contrary, Mayo testified that on the one occasion which officials of the zoning office independently became aware of a noncomplying business (Charley's Grocery), they informed it that it had to seek a variance, and the violation was ultimately eliminated. In any case, even if a policy of tacit acquiescence in existing violations were inferred, it would not render irrational the denial of a request for a variance that would formally validate noncompliance with the ordinance.

In short, the city had "at least debatable" grounds for distinguishing its action on Shelton and Jones's requests from its conduct with respect to other businesses and properties. As a matter of constitutional law, then, it did not treat Shelton and Jones arbitrarily and capriciously and did not deny them substantive due process. Our holding makes it unnecessary to address defendants' claim of immunity under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

III

[17] Whatever be the role of procedural due process here, we are persuaded, as were the district court and the panel, that "[board member] Bailey's mere membership in a church that also opposed the grant of the variances does not by itself establish bias, nor raise an issue as to an 'irrevocably closed mind' that might justify his disqualification from the hearing. . . ." 754 F.2d at 1259 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)).

IV

While a majority of the court has rejected the constitutional claims, we are persuaded that this suit is not "frivolous, unreasonable, or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). We therefore reject defendants' cross-appeal for attorneys' fees under 42 U.S.C. § 1988.

The district court's judgment is AFFIRMED.

ROBERT M. HILL, Circuit Judge, concurring:

Although I was a member of the panel in this case that reversed the grant of summary judgment as to plaintiffs claim of a substantive due process deprivation arising out of the Zoning Board of Adjustment's decision not to grant plaintiffs an off-street parking variance, I am now persuaded that no substantive due process violation occurred by reason of the Board's decision. Accordingly, I join in the en banc majority's opinion holding that the district court's grant of summary judgment in this case was correct.

ALVIN B. RUBIN and ALBERT TATE, Circuit Judges, with whom HENRY A. POLITZ, SAM D. JOHNSON and JERRE S. WILLIAMS, join dissenting:

We dissent from the majority's opinion because it fundamentally misconstrues both the character of the zoning board's action, and our role in reviewing such actions for compliance with fundamental constitutional guarantees. By a stroke of the judicial pen, zoning boards of adjustment have become legislatures and the action of every state or municipal agency, however petty, is now entitled to the same deference as the deliberate enactments of the highest state legislature.

The plaintiffs in this case do not challenge a zoning ordinance adopted by the vote of a local legislative body. They complain only of the allegedly arbitrary and discriminatory denial of an application for a variance from such an ordinance by an appointed Board of Adjustment to whom the city's lawmakers have delegated limited powers. The actions of such a body on the individual application of the owner of a specific property do not merit the deference accorded to legislative enactments.

The majority nominally concedes that a zoning board of adjustment is not a legislative body, although the opinion chooses to call its actions quasi-legislative. The majority professes to apply the long-accepted standard of review for the decisions of such agencies, however characterized: Only arbitrary and capricious actions of the zoning board would violate constitutional rights and become subject to federal judicial review. This is the standard to which we also subscribe. In applying the standard, however, the majority distorts it, equating it

with "the same constitutional standards we employ to review statutes enacted by state legislatures." The test of unconstitutionality is thus alchemized from arbitrary and capricious action to whether "any conceivable rational basis supports the decision." The majority's acknowledgement *en passant* that we are not reviewing legislative action is washed over by a flood of citation to cases that in fact review enactments by truly legislative bodies.

Applying this transmuted standard, the majority finds no disputed facts that warrant taking the plantiffs' claim past summary judgment. In practice, their standard, new in all but name, will pretermit factual disputes in every case, even when genuine disputes of material fact exist, for the actual facts and procedures that led to the zoning board's determination become irrelevant to the judicial inquiry. The real facts, however, must not thus be ignored. A zoning board engaged in quasi-judicial determinations, as this one was, is subject to constraints that do not apply to a legislature. When we review the constitutionality of its actions, we must do so on the basis of its actual conduct and the facts in the record before it. The constitutionality of the quasi-judicial action of an administrative agency is not reviewed with the deference given legislative enactments, and the actions of such a board are not sanitized by post-hoc conjecture concerning the factual determinations it might conceivably have made. When a challenge creates a genuine dispute of material fact relating to the rationality of the actions of a zoning board, the plaintiff's right to a trial on the merits must not be buried in a shroud of affidavits.

I.

The Board of Adjustment created by the City of

College Station, pursuant to Texas statutory authority,[1] is typical of those found in most states. It bears no resemblance to a legislature. Its members are appointed,[2] and, in the words of the statute, "may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent."[3] The Board is empowered only to decide administrative matters and to authorize "upon appeal in specific cases" variances from the ordinance when it finds that, owing to special conditions, literal enforcement would result in unnecessary hardship to the party seeking a variance.[4] The Board has no power to enact or to amend zoning classification plans, either on a municipality-wide or other geographic basis. The limited scope of the Board's authority requires it to analyze the circumstances of the particular zoning problem presented, and to determine whether, for a specific property, an exception to the ordinance is warranted. The Board must hold a public hearing and give notice to the parties in interest.[5] Its decisions, unlike those of a legislature or a city council, are subject to review by the Texas courts, which may affirm, modify or reverse the board's decision.[6]

To formulate its standard of review, the majority opinion relies on what it perceives to be the applicability of legislative rather than adjudicative facts. "In general,"

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1. *See* Tex. Civ. Stat. Ann. art. 1011g (Vernon 1963 & Supp. 1985).

2. *Id.* at § 1011g(b).

3. *Id.* at § 1011g(a).

4. *Id.* at § 1011g(g)3.

5. *Id.* at § 1011g(f).

6. *Id.* at § 1011g(j)-(m).

it states, "historical facts in the adjudicative model are case specific. . . ." Here, the Zoning Board acts and indeed must by statute act, on the basis of just such case-specific facts: those presented to it at the hearing, and conditions in the immediate geographic area. Although the Board must consider the plan and purpose of the ordinance as a whole, its primary basis for determining whether the terms of the ordinance should be varied is the actual situation of the property in question in relation to neighboring properties, the hardship on the variance applicant that would result from enforcement of the ordinance, and the effect on the community of permitting a variance. The facts involved in this kind of a decision are adjudicative because they relate to the details of one particular case.[7] Conversely, "[L]egislative facts do not usually concern the immediate parties."[8]

A board of adjustment has "no statutory power to legislate."[9] The kind of action such a board takes cannot be characterized as even quasi-legislative. Instead, it is properly, and almost universally, characterized as a quasi-judicial or administrative act.[10]

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7. 2 K. Davis, Administrative Law Treatise § 12:3, at 415 (2d ed. 1979). *Cf. Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964).

8. K. Davis, *supra* note 7, at 413.

9. *Board of Adjustment of City of San Antonio v. Willie*, 511 S.W.2d 591, 593 (Tex. Civ. App. 1974).

10. *City of Eastlake v. Forest City Ent., Inc.*, 426 U.S. 668, 683-87, 96 S. Ct. 2358, 2356-68, 49 L.Ed.2d 132, __ (1976) (Powell, J., dissenting); *Robey v. Schwab*, 307 F.2d 198, 201 (D.C. Cir. 1962). *See generally* Cunningham, Rezoning By Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning, 73 Mich.L.Rev. 1341, 1341-42 (1975); Note, Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1512 (1978); 3 R. Anderson, American Law of Zoning § 20.01, at 462 (2d ed. 1977).

Most zoning cases in which the quasi-legislative standard has been invoked have involved challenges stemming from the applicaton of zoning ordinances of a legislative character, not attacks on a property-specific decision of a zoning board of adjustment.[11] Justice Powell expressed the distinction clearly, quoting the Supreme Court of Oregon:

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority. . . . On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.[12]

The majority's admission that procedural due process scrutiny might properly be applied to the Zoning Board's decision demonstrates the Board's nonlegislative character. The majority, however, neither admits the inconsistency involved in exacting procedural due process for legislative decisions, nor considers the limited statutory authority of the Zoning Board, the allegations of the complaint, or the specific facts here involved. Instead, it leaps from

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11. *See, e.g., Couf v. DeBlaker,* 652 F.2d 585, 587-90 (5th Cir.), *cert. denied,* 455 U.S. 921, 102 S. Ct. 1278 (1981); *Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir.), *cert. denied,* 449 U.S. 885, 101 S. Ct. 240 (1980); *Blackman v. City of Big Sandy,* 507 F.2d 935, 936 (5th Cir. 1975); *Nasser v. City of Homewood,* 671 F.2d 432, 441 (11th Cir. 1982); *Rogin v. Bensalem Township,* 616 F.2d 680, 689 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029, 101 S. Ct. 1737 (1981). *But cf. Scudder v. Town of Greendale,* 704 F.2d 999 (7th Cir. 1983).

12. *City of Eastlake v. Forest City Ent., Inc.,* 426 U.S. 668, 684, 96 S. Ct. 2358, 2367, 49 L.Ed.2d 132, ___ (1976) (Powell, J., dissenting) *quoting Fasano v. Board of County Comm'rs,* 264 Or. 574, 580-81, 507 P.2d 23, 26 (1973). *Cf.* R. Babcock, The Zoning Game 158 (1966).

the mere fact that the Board's action affects the use of zoned property to the conclusion that the action is in itself zoning, and that a conjectural set of facts validates the Board's action. That "a state may choose to make a legislative decision by a process that resembles adjudication" is of no consequence to the majority, thereby elevating the standard of review for every state agency acting under legislative mandate to the level of the legislature itself.

This kind of reflective response is no substitute for analysis. On other occasions this circuit has carefully scrutinized local actions that were self-proclaimed "zoning" decisions, and has refused to be dissuaded from review by the mere incantation of the word "zoning". Thus, in *Bayou Landing v. Watts,*[13] we carefully reviewed the refusal of Baton Rouge's city council to issue an occupancy permit to an adult bookstore. Distinguishing that action from zoning, we said, "Zoning . . . connotes a nonparticularized legislative process in which rules are promulgated and land areas designated on a general, prospective basis."[14]

The same careful distinction was observed by the Eleventh Circuit in *Southern Cooperative Development Fund v. Driggers,*[15] in which the court stated:

> The plaintiffs do not challenge the exercise of legislative function by Manatee County, or the validity or legality of the zoning ordinances. On the con-

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13. 563 F.2d 1172 (5th Cir. 1977), *cert. denied,* 439 U.S. 818, 99 S. Ct. 79 (1978).

14. *Id.* at 1175.

15. 696 F.2d 1347 (11th Cir.), *cert. denied,* __U.S.__, 103 S. Ct. 3539 (1983).

> trary, the plaintiffs urge that the Subdivision Regulations be applied as written. What we are called upon to decide is whether the Commission's actions were authorized as a matter of Florida law, and if so whether their actions were in violation of the Due Process clause of the Fourteenth Amendment.[16]

As the Circuit Court for the District of Columbia has written:

> . . . [W]hen a complainant makes a factual showing indicating that one of [the zoning commission] actions is arbitrary that action cannot be sustained unless the Commission puts forward, or the court is otherwise able to discern, some basis in fact and law to justify the action as consistent with reasonableness.[17]

Whether a zoning action is primarily legislative or judicial depends on all of the circumstances, including the nature of the proceeding and the authority of the body that makes the determination.[18] The majority relies on *South Gwinnett Venture v. Pruitt*[19] to support its characterization of the College Station Board's decision as quasi-legislative. *Pruitt,* however, characterized only area-wide zoning and rezoning activities as quasi-legislative, a characterization essentially agreed upon by commentors and courts alike, and one with which we are in complete

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16. *Id.* at 1351.

17. *Shenk v. Zoning Commission,* 440 F.2d 295, 297 (D.C. Cir. 1971). *See also Citizens Assoc. of Georgetown v. Zoning Comm'n of D.C.,* 477 F.2d 402, 408-09 (Ca. D.C. 1973).

18. *Harvard Note, supra,* at 1513.

19. 491 F.2d 5, 7 (5th Cir.) (en banc), *cert. denied,* 416 U.S. 901, 94 S. Ct. 1625 (1974).

agreement.[20] *Pruitt* also denominated the rezoning of a single property quasi-legislative. The opinion, however, was reviewing the action of the Gwinnett County Commissioners, a legislative body empowered to enact and amend geographic zoning plans. The Commissioners, unlike the College Station Zoning Board, were not required by statute to hold an adjudicative hearing before taking action. Even so, its characterization of spot zoning as quasi-legislative has come under recent attack.[21]

Each of the other zoning cases relied on by the majority deals only with area-wide zoning legislation.[22] In these cases, as in *Pruitt*, the courts did not pretend to ignore the actual facts on which the zoning commission, city council, or board acted, but reviewed the record to determine if the zoning decision was, in fact, rational and nonarbitrary.[23] The action of a zoning board in exercising its limited administrative authority to decide on an application for a variance differs *toto caelo* from a legislative enactment.

What is at stake in labeling a decision legislative or quasi-legislative rather than quasi-judicial is more than a

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20. *Cloutier v. Town of Epping*, 714 F.2d 1184, 1191 (1st Cir. 1983); *Citizens Assoc. of Georgetown v. Zoning Comm'n of D.C.*, 477 F.2d 402, 408 (D.C. Cir. 1973); *Gerstenfeld v. Jett*, 374 F.2d 333, 335 (D.C. Cir. 1967); *Cowart v. City of Ocala, Fla.*, 478 F. Supp. 774, 780 (M.D. Fla. 1979); *Sternaman v. County of McHenry*, 454 F. Supp. 240, 245 (N.D. Ill. 1978); *Stephens v. City of Plano, Tex.*, 375 F. Supp. 985, 987 (E.D. Tex. 1974).

21. Harris, Rezoning—Should It Be a Legislative or Judicial Function?, 31 Baylor L. Rev. 409, 409 (1979).

22. *Higginbotham v. Barrett*, 473 F.2d 745 (5th Cir. 1973); *Blackman v. City of Big Sandy, Texas*, 507 F.2d 935 (5th Cir. 1975); *Stansberry v. Holmes*, 613 F.2d 1285 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980).

23. *See Pruitt, supra* at 7; *Higginbotham*, 473 F.2d at 748; *Blackman*, 507 F.2d at 936. *See also Stansberry*, 613 F.2d at 1289.

linguistic nicety. A legislative enactment is entitled to deference when reviewed by the judicial branch, and must be accorded "great weight" when its constitutionality is questioned.[24] A similar degree of judicial deference is appropriate when local governments exercise their zoning powers,[25] and the decisions of local legislatures to zone or to rezone are entitled to a "presumption of validity."[26]

Administrative or quasi-judicial decisions of a local zoning board are different. The appropriate standard by which the constitutionality of such a board's action is reviewed requires that we ask whether the action "is arbitrary and capricious, having no substantial relation to the general welfare."[27] There is no basis for the majority's claim that we should abdicate review of the quasi-judicial or administrative actions of a zoning board of adjustment by ignoring the record and cloaking its actions with a presumption of validity that is virtually irrebutable. Even in *Barbian v. Panagis*,[28] the Seventh Circuit, while reciting a rule similar to that stated by the majority, carefully reviewed the evidence and the basis for the city agency's action before reaching a decision, and gave the agency none of the deference that the majority accords the College Station Board in this case.

Although the majority deprecates any review of the actual basis for the Zoning Board's decision, the opinion undertakes exactly such a review. The majority is care-

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24. *Fullilove v. Klutznick*, 448 U.S. 448, 472, 100 S. Ct. 2758, 2771-72 (1980).

25. *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505, 509 (1982).

26. *Pruitt, supra*, 491 F.2d at 7.

27. *Pruitt, supra*, 491 F.2d at 7.

28. 694 F.2d 476 (7th Cir. 1982).

ful to note that "the Zoning Board articulated a rational basis," and that "the articulated basis was a basis for decision." The opinion concludes with a detailed examination of the record before the Zoning Board and the rationality of the Board's decision belies the majority's opening rhetoric.

II.

The majority has not only applied what is in fact, although not in words, an incorrect legal standard; it has failed to attend to the procedural posture of this case. On a motion for summary judgment, the court must consider all of the evidence in the light most favorable to the opposing party to see if a genuine issue of material fact exists.[29] There are genuine issues of material fact in this case, for there is a real dispute whether the zoning board's action in denying the plaintiffs a variance from the city's off-street parking requirements was arbitrary and capricious.

The plaintiffs showed that similar variances had been granted to other businesses in the area. According to the city director of planning, almost every business in the area at that time failed to comply with the parking requirements. Moreover, a subsequent occupant of the very property involved was granted a variance from the parking requirements by the zoning board. The majority examines each piece of this evidence separately and asks only whether any single bit raises a genuine issue of fact in and of itself. However, the proper approach is to look at the cumulative effect of the evidence. If, taken as a whole, the evidence raises a material factual dispute, then

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29. *Harrison v. Byrd*, 765 F.2d 501, 504 (5th Cir. 1985).

summary judgment should not be granted.[30]

The majority does not inquire whether the board in fact acted arbitrarily or capriciously but only whether its lawyer, or the court, can conjecture an after-the-fact basis for its decision. The proper question to ask when reviewing a non-legislative determination, however, is whether a rational basis *in fact* existed when the action was taken.[31] No plaintiff will be able to overcome the "at least debatable" standard constructed by the majority. To do so, he would be required, by affidavit, to foreclose beyond dispute any possibility other than caprice and arbitrariness. Since this will be impossible when ex post facto conjecture will suffice, the property owner's right to due process will be consistently short-circuited by judgment as summary in operation as its name implies.

III.

The attentive reader of judicial opinions will surely ask: why was this case taken en banc? The majority opinion is based on the same standard of review adopted by the panel and this dissent. The only apparent question remaining is whether or not there is a genuine dispute of material fact sufficient to carry the case past the guillotine of summary judgment. Such a case-specific inquiry would not appear to constitute the kind of issue to which en banc rehearings are restricted by Fed. R. App. P. 35, and by our own internal operating proced-

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30. *Powers v. Nassau Development Corp.*, 753 F.2d 457, 462-63 (5th Cir. 1984), *on suggestion for rehearing en banc*, 756 F.2d 1084, 1085 (5th Cir. 1985) (per curiam).

31. *Robey v. Schwab*, 307 F.2d 198 (D.C. Cir. 1962). *See supra* note 21. *Cf. Harris v. Tobriner*, 304 F.2d 377, 378 (D.C. Cir. 1962); 5 B. Mezines, J. Stein & J. Gruff, Administrative Law § 43.02[7] (1985).

ures, for it involves neither a question of exceptional importance nor the necessity of maintaining uniformity of decisions. If the case is exceptionally important, it is because of something that lurks beneath the surface. The majority opinion gives lip service to judicial review while it abdicates that power. We would not endow minor municipal bodies with such unreviewable authority to trench upon constitutional rights.

APPENDIX B

Fred B. SHELTON, III, et al.,
Plaintiff-Appellants
Cross-Appellees,

v.

CITY OF COLLEGE STATION, et al.,
Defendants-Appellees
Cross-Appellants.

No. 83-2765.

United States Court of Appeals,
Fifth Circuit.

March 11, 1985.

In a suit under the 1871 civil rights statute, against members of a city-created zoning board of adjustment and other defendants, summary judgment for defendants was granted by the United States District Court for the Southern Distrct of Texas at Houston, Norman W. Black, J. On appeal by plaintiffs, and on cross appeal by defendants from denial of attorney fees, the Court of Appeals, Tate, Circuit Judge, held that: (1) District Court applied improper standard in granting summary judgment; (2) a genuine dispute of material fact was demonstrated as to whether seemingly arbitrary denials of parking variance were reasonably based on facts; (3) right, recognized by Texas law, of owner of property interest to use his property for lawful purpose is right judicially enforceable under Texas state law and is sufficiently a property right, a "legitimate claim of entitlement," that arbitrary deprivation thereof implicates invasion of Four-

teenth Amendment due process rights; (4) state's remedies, even if adequate, were not a bar to plaintiffs' action; and (5) city and members of the zoning board of adjustment could be held liable although the city planning director, who had opposed the grant of variances to others in the neighborhood, was not liable.

Judgment affirmed in part and otherwise reversed, and case remanded.

Nelkin & Nelkin, Stuart Nelkin, Rose Ann Reeser, Houston, Tex., for plaintiff-appellants cross-appellees.

Woodard, Hall & Primm, William B. Butler, Houston, Tex., Cathy Locke, ACA, College Station, Tex., for defendants-appellees cross-appellants.

Appeals from the United States District Court for the Southern District of Texas.

Before RUBIN, TATE, and HILL, Circuit Judges.

TATE, Circuit Judge:

The plaintiffs Shelton and Jones appeal from the dismissal of their suit for damages against defendants who allegedly caused them to suffer monetary losses as a result of the defendants' unconstitutional actions under color of state law. 42 U.S.C. § 1983. Made defendants were: the City of College Station, Texas; the members of the city-created Zoning Board of Adjustment for that municipality; and the city planning director. The alleged unconstitutional actions consisted of the arbitrary and discriminatory denial of a zoning variance for the plaintiffs' business property, despite the routine grant of similar requests as to neighboring and other business property in the area.

On the basis of depositions, affidavits, and other exhibits, the district court granted the defendants' motion for summary judgment. The district court did so on the basis that the refusal to grant the variance was not shown to be arbitrary and capricious or to be absent good faith. We reverse and remand. Summary judgment was improvidently granted because the factual showing raises genuine issues of disputed fact as to whether the denial of the variances was arbitrary and discriminatory, and as to whether the indvidual defendants were in good faith so as to be entitled to a qualified immunity for their actions.

I.

The plaintiffs had a property interest in a building across the street from the university in College Station.[1] Desiring to conduct a business on the premises, they unsuccessfully applied four times to the City's Zoning Adjustment Board ("the Board") for a variance from the city zoning's off-street parking requirements. The reasons for the denials were based upon traffic congestion and parking problems in the area. However, the city director of planning admitted that almost every business in the university area at the time was not meeting the parking requirements, and that at least four parking variances had recently been granted by the Board for businesses in that area, despite the opposition of the city's planning department. Deposition of Mayo, 12-14, 49-63. The city plan-

1. One of the plaintiffs had leased the property, and entered into a partnership agreement with the other to operate a business on the premises. The variances were applied for by only one of the plaintiffs. No issue was raised below or in this court that this property interest was insufficient to entitle them to apply for a parking variance, or to have enforceable legal rights under state law for the arbitrary denial thereof.

ning director admitted that these grants of parking variances were inconsistent with the denial of the plaintiffs' application for variance. *Id.*, p. 49. The record also contains minutes of the Board showing the grant of various parking variances to other businesses in the immediate area of the plaintiffs' property. Further, a subsequent occupier of the plaintiffs' property had been granted a variance of the parking requirements by the Board. R. II, 190-191.[2]

In granting summary judgment, the district court relied upon *Couf v. DeBlaker,* 652 F.2d 585 (5th Cir.) *cert. denied,* 455 U.S. 921, 102 S. Ct. 1278, 71 L.Ed.2d 462 (1981), as providing a standard that in a § 1983 action for damages a federal court may consider only " 'whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare.' " 652 F.2d at 588. The district court then held that, under that standard, although "there may be some inferences", in the record, and "there may be a scintilla of evidence" in the record, nevertheless, "the fact remains that there is no evidence that the refusal to grant the variance in this case was arbitrary and capricious."

[1] In granting summary judgment, the district court thus inadvertently referred to the standard for granting a directed verdict or judgment notwithstanding the verdict, after full development of the evidence. *Boeing Company v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). However, a different standard applies before, on a

2. We recognize that, on trial of the merits, full evidence may show justification for the denial of the plaintiffs' application and the grant of the others. For summary judgment purposes, however, the issue is whether the factual showing raises a genuine issue of material fact whether the Board's actions were arbitrary and discriminatory.

truncated summary-judgment factual record, a district court may by summary judgment deny a party a trial on the merits with full evidence before the trier of fact. As we recently summarized in *Hood v. Tenneco Texas Life Insurance Co.*, 739 F.2d 1012, 1014 (5th Cir. 1984):

> [T]he summary judgment standard . . . is a strict one, allowing the entry of summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56(c), *see, e.g., Transource International v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984). Moreover in considering a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party. *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 440 (5th Cir. 1982). However, once the moving party makes an initial showing that no genuine issue of material fact exists, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed R. Civ. P. 56(e). In reviewing a summary judgment on appeal, we apply the same standard as that used by the district court. *Transource*, 725 F.2d at 279.

[2] By this standard, as our previous factual summary demonstrates, the factual showing in the record raises a genuine disputed issue of material fact, i.e., whether the Board acted arbitrarily and discriminatorily in denying the plaintiffs' application for a parking variance, but granting or permitting it as to almost all other businesses in the area, including to the successor to the plaintiffs' interest in the identical property for which they themselves had unsuccessfully sought a parking variance.

The summary judgment was therefore improvidently granted and must be reversed, unless the defendants can prevail on other contentions advanced before us and not reached by the district court. We will discuss these contentions in the following numbered parts of this opinion: II. No recovery is allowable as a matter of law for the denial of a variance from a zoning regulation; III. In any event, the defendant city is immune from liability for the actions of its Zoning Board of Adjustment; and IV. Further, the individual members of the Board and the city planning director, made defendants, are immune from liability for these acts as members of the Board.

II.

The record demonstrates that a city zoning ordinance required businesses to furnish offstreet parking spaces of certain numbers, by criteria established in the ordinance. By an application to the Zoning Adjustment Board, a business operator was permitted to secure a modification or waiver of the offstreet-parking requirement. The effect of a denial of the variance application was to make illegal the operation of that business in those premises, unless the owner provided the requisite offstreet parking. However, as previously noted—the record most favorably supports the inference that, except in the case of the plaintiffs, the parking variances sought for businesses in that neighborhood were almost routinely granted, and that the off-street parking requirements were not in fact enforced against businesses in that area.

[3] The defendant city contends that, nevertheless, no action for damages sustained by the denial of a zoning variation, admittedly under color of state law, is cogniz-

able under 42 U.S.C. § 1983. The city's contentions in this regard are two-fold: (a) given the limited scope of judicial review of zoning actions, the plaintiffs as a matter of law do not have a cause of action for the allegedly arbitrary and discriminatory denial of their request for a zoning variance; and (b) in any event, the denial of a zoning variation is not a deprivation of "property" within the protection of the Fourteenth Amendment, so as to entitle a person aggrieved thereby to sue under 42 U.S.C. § 1983 for damages resulting of a violation of the plaintiffs' federal constitutional rights.

As to (a):

In *South Gwinnett Venture v. Pruitt,* 491 F.2d 5 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 837, 93 S. Ct. 66, 42 L.Ed.2d 64 (1974), the en banc court established governing circuit principle. In their rejecting the claim of aggrieved owners that a rezoning regulation had offended the plaintiffs' Fourteenth Amendment rights, we stated that "[t]he only question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare." 491 F.2d at 7; *see also, Couf v. DeBlaker, supra,* 652 F.2d at 588. We also held that this principle applied, whether the zoning action was the adoption of a comprehensive zoning plan or (as there) the reclassification of a piece of property under an existing plan.

The en banc court in *South Gwinnett* then held that the zoning commissioners had established adequate reasons for their denial of reclassification to the plaintiffs. This holding, however, was in the context of an evidentiary hearing at which full opportunity to develop the

factual basis of the claim was afforded. 491 F.2d at 6; *see* district court opinion, 342 F.Supp. 703, 705 (N.D. Ga. 1972). Before so holding, however, *South Gwinnett* stated, preliminarily thereto, that "upon a factual showing of arbitrariness there must be [shown] some basis in fact or law to justify the zoning action as consistent with reasonableness." *South Gwinnett,* 491 *supra* at 7.

For purposes of summary judgment, this prong of the *South Gwinnett* test was not here met. In the present case, as we have previously noted, a genuine dispute of material fact is demonstrated as to whether the seemingly arbitrary denials of the parking variance were reasonably based in fact. Summary judgment was therefore precluded on this issue.

As to (b):

The plaintiffs' suit is founded on 42 U.S.C. § 1983, by which a federal cause of action is granted to those subjected under color of state law to a deprivation of rights under the federal constitution and laws. The defendants point out that no § 1983 action is shown unless the plaintiffs show a property interest protected by the Fourteenth Amendment, *Bishop v. Wood,* 426 U.S. 341, 343, 96 S. Ct. 2074, 2077, 48 L.Ed.2d 684 (1976), and that whether the plaintiffs possessed such property interest is to be determined by reference to state law, *id.*

The defendants argue that the denial of the zoning variance, even if arbitrary, did not deprive the plaintiffs of a "property" right under Texas law.

[4] As stated in *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548 (1972):

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independant source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

[5] With regard to the right of an owner not to have his use of his property arbitrarily restricted, the defendants themselves admit, although in another context, that property-interest owners under state law can in Texas state courts obtain redress for actions of Zoning Boards of Adjustments, if they arbitrarily grant or deny variances that restrict the use of or affect their property. *Board of Adjustment of City of San Antonio v. Willie,* 511 S.W.2d 591 (Tex. Civ. App. 1974; writ ref. n.r.e.); *Swain v. Board of Adjustment of City of University Park, Texas,* 433 S.W.2d 727 (Tex. Civ. App. 1968); writ dism'd w.o.j.), *cert. denied,* 396 U.S. 277, 90 S. Ct. 563, 24 L.Ed.2d 465 (1970). Texas law in general recognizes a judicial remedy for a property owner aggrieved by an arbitrary and unreasonable zoning action by a municipal agency, *Hunt v. City of San Antonio,* 462 S.W.2d 536, 539 (Tex. 1971), including where, through arbitrary and discriminatory exercise of the power to deny zoning applications, the municipal actor deprives the owner of a property interest of a business use of his property that is permitted to others similarly situated, *City of Austin v. Nelson,* 45 S.W.2d 692 (Tex. Civ. App. 1931), *City of Austin v. Deats,* 32 S.W.2d 685 (Tex. Civ. App. 1930).

[6] Thus, Texas law recognizes that the right of the owner of a property interest to use his property for a lawful purpose cannot be arbitrarily and discriminatorily

restricted by governmental zoning action. This right, judicially enforceable under state law, is, in our view sufficiently a property right—a "legitimate claim of entitlement," *Board of Regents v. Roth, supra,* 408 U.S. at 577, 92 S. Ct. at 2709—that the arbitrary deprivation thereof implicates an invasion of Fourteenth Amendment due process rights. *See, e.g., Perry v. Sinderman,* 408 U.S. 593, 599-603, 92 S. Ct. 2694, 2698-2700, 33 L.Ed.2d 570 (1972).

[7] An additional related contention is made by the defendants. Whether or not a property right of the plaintiffs was violated, they contend that, nevertheless, no denial of due process occurred on which to base a § 1983 claim, because an adequate state remedy was provided by state law for this alleged wrong. *Parratt v. Taylor,* 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed.2d 420 (1981). We pretermit discussion of whether state law provides a *damage* remedy for deprivations of property through unconstitutional abuse of the zoning power; for (even if so), as we have held in *McCrae v. Hawkins,* 720 F.2d 863, 870 (5th Cir. 1983), the principle established by *Parratt* does not apply when the plaintiff's claim is based either upon deprivation of a liberty interest or (as here) upon the intentional deprivation of a property interest "pursuant to established state procedure." *Hudson v. Palmer,* ____U.S.____, ____, 104 S. Ct. 3194, 3203-04, 82 L.Ed.2d 393 (1984); *Augustine v. Doe,* 740 F.2d 322, 328-29 (5th Cir. 1984).

III.

The defendant city further argues that, as a matter of law, it cannot be held liable for any arbitrary and discriminatory acts of its zoning adjustment board that may have offended the plaintiffs' federal constitutional

rights. It relies upon the principle that a city may not be held liable under 42 U.S.C. § 1983 for injury inflicted by its employees or agents except where the latters' acts "may fairly be said to represent official policy." *Monell v. Department of Social Services,* 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). *See also Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir.) (en banc), *reh. den.,* 735 F.2d 861 (5th Cir. 1984).

In the per curiam denying rehearing in *Bennett,* the en banc court for this circuit unanimously agreed on the statement of governing criteria by which a municipality's § 1983 liability is to be determined in accordance with this *Monell* principle:

> A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflcted pursuant to official policy.
>
> Official policy is:
>
> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or *by an official to whom the lawmakers have delegated policy-making authority; or*
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.
>
> Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

735 F.2d at 862 (emphasis added).

[8] In the present case, the defendant city is liable for injury inflicted by unconstitutional acts of its zoning adjustment board, for the city lawmakers had delegated exclusive policy-making authority to that Board with regard to the grant or denial of variances from the city's zoning regulations. The College Station Zoning Board of Adjustment was established by ordinance of the city council, as authorized by Vernon's Tex. Rev. Stat. art. 1011g (1984 Supp.). Under that statute, and under the municipal ordinance adopted as authorized thereby, the Board—created by the city council, and its members appointed by it—is the sole municipal authority by which variances from the general municipal zoning ordinances may be granted. The Board's grant or denial of a variance is not subject to review by the city council. Any persons aggrieved by any decision of the Board may appeal solely to the courts for relief from any illegal action of the Board.

[9] As summarized in *Board of Adjustment of the City of San Antonio v. Willie, supra,* 511 S.W.2d at 593:

> A Board of Adjustment acts as a quasi-judicial body, having no statutory power to legislate. It is restricted in its decisions to the powers vested in it by the legislature and city council. It may not materially alter the specific intent and extent of the zoning ordinance as this power is within the province of the city council.

See, to the same effect, *Swain v. Board of Adjustment of the City of University Park, supra,* 433 S.W.2d at 731.

The Board of Adjustment is thus the exclusive agency of the city to administer the city's policy. It is the official agency to which "the [city] lawmakers have delegated policy-making authority," *Bennett, supra,* 735 F.2d at

862, with regard to the grant or denial of zoning variances. Accordingly, the city is liable for injury caused by unconstitutional acts of its agent, the Board. *See also Thomas v. Sams,* 734 F.2d 185 (5th Cir.), *reh. den.,* 741 F.2d 783 (5th Cir. 1984).

IV.

The defendant members of the Board also claim immunity for their discretionary acts in administering the city's zoning-variance policy. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

[10, 11] A public official may, however, be held liable if he violated constiutional or statutory rights that were clearly established at the time he acted such that a reasonably competent official should have then known the rules of law governing his conduct, *unless* the official pleads and proves in his defense extraordinary circumstances by virtue of which he neither knew nor should have known of the relevant legal standard. *Id.,* 457 U.S. at 819, 102 S. Ct. at 2739. Applying this standard, summary judgment dismissing the action against the Board members individually was precluded by the disputed factual issue as to whether they arbitrarily and discriminatorily denied the plaintiffs' requests for zoning variances. If indeed they did so, they violated clearly established constitutional standards and rules of law, of which reasonably competent officials should have known.

[12] A different result obtains, however, as to Al Mayo, the city planning director, also sued as defendant. The city planning director administered the processing of applications for zoning variations and made recommendations to the Board, when brought before it, for the Board's grant or denial. The record without dispute shows that Mayo consistently opposed the grant of variances to others in the neighborhood, on the ground that grant of the variances was contrary to city zoning policies, although the Board overrode his recommended denials. His action in recommending the denial of the plaintiffs' applications was consistent with his shown attempted nondiscriminatory enforcement of the city's variance policy, as he viewed it. The summary judgment dismissing the action against him should be affirmed.

V. *Other Issues*

Two subsidiary issues remain:

[13] *Procedural Due Process.* The plaintiffs contend that they were denied procedural due process because Bailey, a member of the Board who opposed the grant of the plaintiffs' applications for variance, was a member of a church that opposed the variances. The showing made falls far short of establishing a factual issue as to the claimed denial of procedural due process (allegedly the lack of a fair hearing before an impartial fact-finder). For one reason, among others sustaining the district court's dismissal of this claim by the defendants, Bailey's mere membership in a church that also opposed the grant of the variances does not by itself establish bias, nor raise an issue as to an "irrevocably closed mind" that might justify his disqualification from the hearing, *see Federal Trade Commission v. Cement Institute,* 333 U.S.

683, 701, 68 S. Ct. 793, 803, 92 L.Ed. 1010 (1948); K. Davis, Administrative Law Treatise § 19.2 (2d ed. 1980)—even if we concede (as we do not) that the failure of one of five commissioners to disqualify himself because of bias somehow contributed to a denial of procedural due process in violation of the Fourteenth Amendment. The summary judgment dismissing the claim of denial of procedural due process is affirmed.

[14] *Cross-Appeal: Attorney's Fees:* By their cross-appeal, the defendants contend that the district court erred in denying them attorney's fees, 42 U.S.C. § 1988, against the plaintiffs for their instituting this allegedly frivolous § 1983 suit. Attorney's fees should not be awarded against plaintiffs in unsuccessful § 1983 suits unless the " 'action was frivolous, unreasonable, or without foundation.' " *Hughes v. Rowe,* 449 U.S. 5, 14, 101 S. Ct. 173, 178, 66 L.Ed.2d 163 (1980). The cross-appeal is mooted by our reversal.

Conclusion:

For the reasons assigned, therefore: we AFFIRM the dismissal of the action against the defendant Mayo; we AFFIRM the grant of partial summary judgment dismissing the plaintiffs' claim of a denial of procedural due process; we AFFIRM the denial of attorney's fees; but we otherwise REVERSE the judgment dismissing the plaintiffs' action, and we REMAND this case for further proceedings consistent with this opinion. The defendants (except for Mayo) are assessed with costs.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. H-81-2044

FRED B. SHELTON, III, et al.,
Plaintiffs,

v.

CITY OF COLLEGE STATION, et al.,
Defendants.

(Filed February 23, 1984)

TRANSCRIPT OF PROCEEDINGS

October 14, 1983

BEFORE: NORMAN W. BLACK, Judge

David M. Erwin, RPR, CP
Official Federal United States Court Reporter
United States Court House, Room 7701
515 Rusk Avenue
Houston, Texas 77002
(713) 221-9582

* * *

MR. REINFELD: Yes, your Honor.

THE COURT: All right. Now, I'd say that I don't think the facts are very much in dispute in this case. I think the only facts I've heard argued today is what Mr. Jones told the board with regard to Mr. Bailey's possible conflict of interest. I don't think whether he discussed with, as he put it in his deposition, quote, the City Staff, the City Planner and the zoning officials, unquote, or not is relevant.

There was nothing in the minutes of any of the meetings to indicate an attack on Mr. Bailey's ability to sit in this matter. I'm not sure that's particularly relevant because I think as a matter of law there is no evidence that Mr. Bailey was prejudiced against Mr. Shelton to the extent required by the case law to make the conduct of the board arbitrary and capricious.

We all know, for example, that at the first attempt to get a variance on August 14, 1979, there was, according to the minutes which seem to be not in dispute, a great deal of discussion among the board members. Mr. Jones was given the opportunity to present his case thoroughly. Discussion went back and forth among the members and Mr. Jones. A vote was taken and only one board member, Mr. Harper, I assume, voted for the variance. Burke, Boughton and Bailey voted against.

On November 20th, 1979, another presentation was made by Mr. Jones. There was once again substantial discussion among the members. Mr. Jones was given an opportunity to speak. Mr. Shelton was given an opportunity to speak. Two individuals, otherwise unidentified except by name, spoke in opposition to the variance and at this second meeting, Plaintiffs picked up two more

votes. They now have Mr. Harper, Burke and Mathewson voting in their favor but since four votes are required, they were not granted the variance.

I noticed, according to the minutes of this meeting, Mr. Bailey was not present. The two members voting against are Messrs. Upham—Mr. Upham and Ms. Boughton.

Then at their last attempt, which was January 15th, 1980, once again there was a presentation made. This time for the Pinball Wizzard Arcade. Several people spoke in opposition to the variance, including Mr. Penell (Phonetic) of the church. There was a considerable amount of discussion about whether this variance should be given or not, discussion about whether more patrons would walk or drive and much discussion, apparently, of the general problem in the Northgate Area, which I assume is the general geographical designation.

The vote once more was Harper, Burke and Mathewson for the variance and Mr. Bailey and Mr. Upham against the variance. So, the variance, once again, failed.

Without deciding the very difficult question of what their property interest might be, let's look at the law as I believe it applies in this case.

I think the case that is most significant is *Coat versus Deblacker,* which was decided by the Court of Appeals for the Fifth Circuit in 1981, 652 Federal 2nd 585. In that case a developer bought a piece of property in Florida, which was zoned for high density condominiums. After he purchased it, the Zoning Board, reduced, as they said, down-zoned the property so that you could not build as many condominiums on the same piece of property, which would appear to be a classic taking of property which he already acquired.

There have been in that case, strangely enough, a State Court proceeding and in that State Court proceeding I seem to see a finding that the down-zoning was arbitrary and irrational. Despite that, the Fifth Circuit finds that even though the Plaintiff developer got a jury verdict, the judge granted a verdict, notwithstanding the jury—the judgment, notwithstanding the jury verdict was correct.

On this issue of arbitrary and capricious, as I read this case, the Plaintiffs' appeal from the entry of a judgment notwithstanding the verdict in favor of the Defendants, which mean Plaintiffs, got a verdict from the jury. The judge set it aside, gave a judgment for the Plaintiff and they were rather harsh in this decision, the Fifth Circuit was.

Note this language from Page 588: "Unless an ordinance or classification and the use of the property as a classification has the purpose or effect of injuring a protected group or restricting a protected activity the Constitution places very few substantive limitations on local zoning."

Citing *Chad versus the Borough of Mt. Trian,* 101 Supreme Court 2176 and further citing from South Gweneth, which we've discussed earlier, "A zoning commission is a quasi-legislative body. It is not required to make findings of fact or state the reasons for the action taken. Its actions are entitled to a presumption of validity. The only question which the Federal District Court may consider is whether the action of the Zoning Commission is arbitrary and capricious having no substantial relation to the general welfare."

And further they cite that very same quotation twice in this opinion and they go on to say, "The only conclu-

sion we can draw from the statement in the South Gweneth Case is that Federal review of zoning disputes should be limited to a single issue. Our opinions repeatedly characterize local zoning decisions as legislative in nature. If this word is used visibly as it appears to be, then the Plaintiffs cannot complain of a denial of a procedural due process for no Constitutional limitation on legislative procedure is relevant here."

Going on to say, "The Plaintiffs do not cite a single Federal case that even discusses procedural requirements for zoning matters. In that case, they even had an allegation by the Plaintiffs that one of the zoning commissioners had a pecuniary interest in the adjoining property in that he had once attempted to purchase it and they said even if we assumed that a Federal cause of action could be based on proof of bad faith and that the question of the motivation of the Defendants was one for the fact finder, there simply is not enough evidence to create a jury issue."

Counsel, I think we find ourselves in this case exactly in that same position. Even if everything the Plaintiffs say is true, that other people got variances at other times for other purposes, the fact remains that there is no evidence that the refusal to grant the variance in this case was arbitrary and capricious. There may be some inferences. There may be some allegations. There may be a centile (phonetic) of evidence, but I just don't think it meets the unbelievably difficult standards that the Fifth Circuit places on me in this Coat—that case, if I'm pronouncing that name correctly.

I think the other side of that coin is the good faith argument that the Defendants make and I don't think we have to reach that because if there is insufficient evidence

to go to the jury, as I believe there is, on arbitrary and capricious conduct, we never reach the question of whether there was good faith.

If we did reach that question, I don't think there would be any question but that there is no testimony that their conduct was anything other than in good faith except the one allegation made against Mr. Bailey, that he belonged to a church and that the church was opposed to the zoning.

I am interested in seeing what the outcome of the Lidell (phonetic) Gravel Case is. I read it in its panel form, but based on the law as enumerated by the Circuit Court in the Coat's Case, I have to grant Defendants' motion for summary judgment.

MR. REINFELD: Will your Honor be issuing a written opinion on this?

THE COURT: Not unless I am requested to make additional findings of fact and conclusions of law.

MR. REINFELD: What about a final judgment?

THE COURT: I will issue a final judgment immediately upon being presented one.

MR. REINFELD: We would like to have findings, your Honor, if we could in this case.

MR. BUTLER: The Court findings from the Bench are satisfactory to us, but if—

THE COURT: All right. I see no need to write them further. When you get your copy of the record, the Fifth Circuit will see what my findings of fact and conclusions of law are.

MR. REINFELD: Thank you, your Honor.

THE COURT: Thank you very much, ladies and gentlemen.

MR. BUTLER: May it please the Court, having granted the motion, we now advise the Court that we would like to file a motion under 42 USC 1788 that the attorneys' fees for the Defendants in this case be allowed as a judgment against the Plaintiffs as is allowed by that statute and would like to have such hearing as the Court may feel appropriate to determine the amount of those fees and whether or not it would be appropriate to grant.

THE COURT: If you want to file your motion, please feel free to do so with simply an affidavit to your attorneys' fees attached.

MR. BUTLER: All right.

THE COURT: Counsel for the Plaintiffs can respond. So far, I can tell you I'm not disposed to grant such a motion, unless it comes through a lot stronger.

MR. REINFELD: Thank you so much, your Honor.

THE COURT: Thank you. We'll stand at recess.

* * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-2765
District Court Docket No. C.A. H-81-2044

FRED B. SHELTON, III, ET AL.,
Plaintiffs-Appellants
Cross-Appellees,

versus

CITY OF COLLEGE STATION, ET AL.,
Defendants-Appellees
Cross-Appellants

Appeals from the United States District Court
Southern District of Texas

JUDGMENT ON REHEARING EN BANC

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by the Court that the opinion entered by a panel of this Court on March 11, 1985, af-

firming in part, reversing in part, and remanding the judgment of District Court is set aside. The judgment of the District Court is hereby affirmed by the Court *en banc*.

IT IS FURTHER ORDERED that Plaintiffs-Appellants pay to Defendants-Appellees the costs on appeal to be taxed by the Clerk of this Court.

January 6, 1986

HILL, Circuit Judge, concurring
RUBIN and TATE, Circuit Judges with whom POLITZ, JOHNSON and WILLIAMS, join dissenting

ISSUED AS MANDATE: January 28, 1986

APPENDIX E

TEX. REV. CIV. STAT. ANN.
(Vernon 1983 & Supp. 1986)

Art. 1011g. Board of adjustment

(a) Such local legislative body may provide for the appointment of a Board of Adjustment, and in the regulations and restrictions adopted pursuant to the authority of this Act may provide that the said Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

(b) The Board of Adjustment shall consist of five (5) members, each to be appointed for a term of two (2) years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. Provided, however, that the governing body of any city may, by charter provision or ordinance, provide for the appointment of four (4) alternate members of the Board of Adjustment who shall serve in the absence of one or more regular members when requested to do so by the mayor or city manager, as the case may be. All cases to be heard by the Board of Adjustment will always be heard by a minimum number of four (4) members. These alternate members, when appointed, shall serve for the same period as the regular members and any vacancies shall be filled in the same manner and shall be subject to removal as the regular members.

(c) The Board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this Act. Meetings of the Board shall be held at the call of the chairman and at such other times as the Board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the Board shall be open to the public. The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Board and shall be a public record.

(d) Appeals to the Board of Adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the Board, by filing with the officer from whom the appeal is taken and with the Board of Adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

(e) An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the Board of Adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed

otherwise than by a restraining order which may be granted by the Board of Adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

(f) The Board of Adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(g) The Board of Adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this Act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such Board is required to pass under such ordinance.

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

(h) In exercising the above-mentioned powers such Board may, in conformity with the provisions of this Act, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination ap-

pealed from and make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

(i) The concurring vote of four (4) members of the Board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

(j) Any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustment, or any taxpayer, or any officer, department, board or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within ten (10) days after the filing of the decision in the office of the Board.

(k) Upon presentation of such petition the court may allow a writ of certiorari directed to the Board of Adjustment to review such decision of the Board of Adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten (10) days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the Board and on due cause shown, grant a restraining order.

(*l*) The Board of Adjustment shall not be required to return the original papers acted upon by it, but it shall

be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(m) If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm wholly or partly, or may modify the decision brought up for review.

(n) Costs shall not be allowed against the Board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.

(*o*) Repealed by Acts 1981, 67th Leg., p. 2646, ch. 707, § 4(54), eff. Aug. 31, 1981.

APPENDIX F

ZONING ORDINANCE NO. 850 OF THE CITY OF COLLEGE STATION, TEXAS

SECTION 11. BOARD OF ADJUSTMENT

11-A. CREATION OF THE BOARD OF ADJUSTMENT: The City Council shall provide for the appointment of a Board of Adjustment and the regulations and restrictions adopted shall be pursuant to the provisions of applicable statutory requirements of the State of Texas. The Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of this zoning ordinance in harmony with its general purpose and intent and in accordance with general and specific rules herein contained.

11-B. POWERS AND DUTIES: The Board of Adjustment shall have the following powers:

11-B.1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, interpretation, or determination made by the Zoning Official in the enforcement of this ordinance.

11-B.2. To interpret the intent of the Zoning District Map where uncertainty exists because the physical features on the ground vary from those on the Zoning District Map and none of the rules set forth in Section 2 apply;

11-B.3. To hear and decide requests for Use Permits for:

(a) The substitution of one nonconforming use for another nonconforming use when the extent of the substituted use is found to be less detrimental to the environment than the first,

(b) The enlargement of a building devoted to a nonconforming use where such extension is necessary and incidental to the existing use of such building and does not increase the area of the building devoted to a nonconforming use more than twenty-five per cent (25%) and does not prolong the life of the nonconforming use or prevent a return of such property to a conforming use,

(c) The reconstruction of a nonconforming structure or building on the lot or tract occupied by such building if the cost of reconstruction is less than sixty per cent (60%) of the appraised value of the structure or building and if the reconstruction would not prevent the return of such property to a conforming use or increase the nonconformity of such nonconforming structure or building;

11-B.4 To initiate on its motion, or cause to be presented by interested property owners, action to bring about the discontinuance of a nonconforming structure under any plan whereby full value of the structure can be amortized within a definite period of time, taking into consideration the general character of the neighborhood and the necessity for all property to conform to the regulations of this ordinance;

11-B.5. To authorize upon appeal variances of the yard, lot width, lot depth, signs, minimum setback, off-street parking or off-street loading regulations from the terms of this ordinance as will not be contrary to the public interest, where owing to unique and special conditions of the land not normally found in like districts a strict enforcement of the provisions of the ordinance by the Zoning Official would result in unnecessary hardship, and so that the spirit of this ordinance shall be observed and substantial justice done.

11-C. ORGANIZATION OF THE BOARD: The Board of Adjustment shall consist of five (5) members who are residents of the City and qualified voters. Each shall be appointed for a term of two (2) years, except that two (2) members appointed initially shall have terms of only one (1) year. After the initial appointments, two (2) members shall be appointed in odd numbered years to maintain a membership of five (5) members.

Members shall be removable for cause by the City Council upon written charges and after a public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. However, the City Council may provide for the appointment of four (4) alternate members of the Board of Adjustment who shall serve in the absence of one (1) or more regular members when requested to do so by the Mayor. All cases to be heard by the Board of Adjustment will always be heard by a minimum number of four (4) members. These alternate members, when appointed, shall serve for the same period as the regular members and any vacancies shall be filled in the same manner and shall be subject to removal as the regular members.

11-D. RULES AND REGULATIONS: The Board shall develop and adopt rules in accordance with the provisions of this ordinance. Meetings of the Board shall be held at the call of the Chairman and at such other times as the Board may determine. Such Chairman, or in his absence the acting Chairman, may administer oaths and compel the attendance of witnesses. All meetings of the Board shall be open to the public. The Board shall keep minutes of its proceedings, showing the vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed

in the office of the Board (the office of the City Secretary) and shall be a public record.

11-E. APPEALS: Appeals to the Board of Adjustment may be taken by any person aggrieved or by any officer, department, board, commission or committee of the City affected by any decision of the Zoning Official. Such appeal shall be made within thirty (30) days of the date of the notification by filing with the Zoning Official and with the Board of Adjustment a notice of appeal specifying the grounds thereof. The Zoning Official shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the Zoning Official certifies to the Board of Adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The Board of Adjustment shall hear the appeal within sixty (60) days of the date of the appeal application or such extension as requested by the applicant, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

11-F. REVISION OF APPEALED DECISIONS: In exercising the above mentioned powers such Board may,

in conformity with the provisions of this ordinance, reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have the power of the Zoning Official from whom the appeal is taken.

11-G. VOTES NECESSARY: The concurring vote of four (4) members of the Board shall be necessary to reverse any order, requirement, decision or determination of the Zoning Official, to decide in favor of the applicant or any variation in this ordinance.

11-H. APPEALS FROM THE BOARD OF ADJUSTMENT: Any person or persons or any taxpayer or any officer, department, board, commission or committee of the City, jointly or severally, aggrieved by any decision of the Board of Adjustment, may present to a court of record a petition, verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within ten (10) days after the filing of the decision in the office of the Board.

SECTION 12. RESPONSIBILITIES OF THE COMMISSION, ZONING OFFICIAL, BOARD OF ADJUSTMENT, AND THE CITY COUNCIL

12-A. It shall be the responsibility of the Commission to hear all applications for zone changes and changes in the Zoning Ordinance, as prescribed by law and this ordinance, and to recommend action to the City Council. The Commission has authority to approve conditional uses under the provisions of Section 6-L. The Commission has no authority to approve variances from the re-

quirements of this ordinance. Request for variances shall be presented to the Zoning Official and if within the province of Section 11-B., the request shall be sent forward to the Board of Adjustment for hearing period.

12-B. The Zoning Official is charged with the interpretation of and the enforcement of this ordinance. Appeals from a decision of the Zoning Official shall be presented to the Zoning Official who shall forward such appeals with all pertinent information to the Board of Adjustment for hearing.

12-C. The Board of Adjustment shall hear and decide all questions on appeal from decisions of the Zoning Official and all other questions as provided in Section 11-B., Powers and Duties of the Board of Adjustment.

12-D. The City Council has sole responsibility for changes in the Zoning Map and changes in the zoning ordinance. The City Council shall not hear complaints of or decide questions of interpretation or enforcement that are reserved for the Board of Adjustment.

The City Council shall also have the responsibility of appointing the Planning and Zoning Commission and the Board of Adjustment.

Supreme Court, U.S.
FILED
JUN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1846

In The

Supreme Court of the United States

October Term, 1985

FRED B. SHELTON, III and JOHN PAUL JONES,

Petitioners,

vs.

CITY OF COLLEGE STATION, ALBERT MAYO, E. MURL BAILEY, VIOLETTA BURKE COOK, PATRICIA BOUGHTON AND JACK UPHAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err, and if so, is the error of sufficient importance to justify review by this court, in holding that review of the factual basis for the action of a city's zoning board of adjustment claimed to violate substantive due process is limited to determining whether there was a conceivable rational basis for the board's action?

Should this Court grant Certiorari because it does not accept the rationale of the Court of Appeals opinion when the judgment entered by that Court is correct?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption on the case as it appears on the cover and at the beginning of the brief contains the names of all of the parties. The only corporation which is a party is the City of College Station, a municipal corporation which has neither parents, subsidiaries nor affiliates.

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No. 85-1846

In The

Supreme Court of the United States

October Term, 1985

FRED B. SHELTON, III and JOHN PAUL JONES,

Petitioners,

vs.

CITY OF COLLEGE STATION, ALBERT MAYO, E. MURL BAILEY, VIOLETTA BURKE COOK, PATRICIA BOUGHTON AND JACK UPHAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THE OPINIONS BELOW

The citations to the opinions below which appear in the Petition for Certiorari[1] are correct. However, the reproduction of the Opinion of the Court of Appeals *en banc* which appears in appendix A to the Petition con-

[1]The Petition for Writ of Certiorari is herein cited as Pet. ——. The appendices to that Petition are cited by the appendix page number as App. ——a.

tains a "summary" preceding the "opinion" which was in the slip opinion but is not reproduced in the report of the opinion at 780 F.2d 475.

The reproduction of the finding of fact and conclusions of law of the District Court in appendix C to the Petition does not include the Judgment of the District Court which contains the Court's ruling on respondent's motion for allowance of attorneys' fees. That is reproduced as appendix A to this brief.

———o———

STATEMENT OF THE CASE

Petitioners sued respondents, a small Texas city, its city planner and four members of its Zoning Board of Adjustment (ZBA), asserting that the failure of the ZBA to grant them variances denied them property without due process of law. The variances, if granted, would have permitted petitioners to operate businesses without complying with the provisions of the City's zoning ordinance requiring businesses to furnish offstreet parking. Petitioners alleged that they were denied substantive due process because the action was arbitrary and capricious, and procedural due process because one of the members of the ZBA who voted against them should have recused himself because he was a member of a church which opposed the granting of the variances and was prejudiced.

Respondents moved for and were granted summary judgment. A panel of the Court of Appeals for the Fifth Circuit reversed that decision, declaring that the summary judgment evidence showed that there was a question

of fact as to whether the board's action was arbitrary or discriminatory that should be resolved in a plenary trial. The Court of Appeals *en banc* reversed that decision, and affirmed the summary judgment with ten judges joining the opinion for the Court and five dissenting.

Petitioners now seek to have this Court issue a writ of certiorari to review that opinion and judgment.

STATEMENT OF FACTS

Petitioners planned to open a pool hall and bar in space in a building that they had leased. That property, located directly across a very busy street from the campus of Texas A & M University, was in a business area referred to as Northgate. There were serious traffic congestion problems in the Northgate area which were aggravated by a shortage of parking space. The City's zoning ordinance required all businesses in that area to furnish specified numbers of offstreet parking spaces, but most of the businesses in the area, operating as non-conforming uses in existence at the time the parking requirements were imposed, did not furnish the required spaces.

Petitioners applied three times to the ZBA for variances that would have permitted them to operate the pool hall and bar, and an additional time for a variance that would permit them to operate an arcade without complying with the requirements for furnishing offstreet parking. They argued to the ZBA that the customers for their proposed businesses would not come by car, but would walk from nearby dormitories. Therefore, they argued,

their proposed businesses would not aggravate the traffic problems in the Northgate area. Although on some of the applications petitioners got three of the five ZBA members to vote to grant them the variances, they were never able to get the four affirmative votes required by the zoning ordinance and the Texas statute.

The Texas statutes provide for prompt appeal to the Texas courts by anyone adversely affected by a ZBA's action. Petitioners made no attempt to use this procedure. Approximately twenty months after the last of their applications was denied petitioners filed this action seeking to recover damages from the City and the individual defendants. The complaint alleged that petitioners were entitled to equitable relief but no attempt was made to urge that claim.

After taking petitioners' depositions, respondents filed a Motion for Summary Judgment supported by affidavits, ZBA records and references to those depositions. Respondents' summary judgment evidence showed that there was a serious parking problem in Northgate, and that the ZBA members who voted against granting the variances believed, and had good reason to believe, that petitioners' business would aggravate that problem. The summary judgment evidence submitted by petitioners was records of the ZBA showing that more than a year after the last of petitioners' applications was acted upon the ZBA granted variances to other businesses in the area, plus depositions of defendants and references to their own depositions. Much of Petitioners' argument was that most of the businesses in Northgate were not complying with the parking requirement, and that their proposed businesses would not have aggravated the traffic problem.

SUMMARY OF THE ARGUMENT

Respondents assert that the only objection petitioners have to the opinion for the Court of Appeals is that it severely restricts the extent to which federal district courts can review the factual basis for a zoning decision when the only real complaint is that that decision was not what the plaintiff wanted it to be.

The Court of Appeals' characterization of the action of a ZBA in passing on a request for a variance as quasi-legislative is correct, but even if it is not the limitation on factual review reached by that rationale is correct and should not be disturbed.

Petitioners do not show any conflict between the circuits. Petitioners assert there is a conflict because cases from other circuits hold that a substantive due process claim can be established by showing arbitrary, capricious or illegal denial of a land use permit. The opinion of the Court below does not question that principle. It uses it as a premise for the prescription of limits on the factual review that a federal court will make to see if it is established, a principle that the cited cases do not discuss.

Neither a variance nor a procedure for getting one is "property". Even if it be assumed, arguendo, that petitioners were denied due process, summary judgment against them was proper because they were not denied "property".

Even if this Court does not agree that factual review of the ZBA's actions should be limited because those actions are quasi-legislative, a more extensive review of

those actions, not limited by that rationale, shows that petitioners were not denied due process.

Apart from the reasons discussed in its opinion, the Court of Appeals' judgment affirming the summary judgment for defendants was correct because (1) the individual defendants are entitled to immunity from personal liability, and (2) the city cannot be held liable for ZBA's denial of variances because that action did not make, nor was it pursuant to, city policy.

———o———

ARGUMENT

1. Introduction

Underlying all of Petitioners' arguments that this Court should review this case is their objection to the opinion for the Court of Appeals because of the limits made clear by that opinion on the review by a federal court of the factual basis for an action by a local zoning agency. In Petitioners' words, the Court's opinion "precludes any meaningful review." (Pet. 11) The petitioners' arguments do not acknowledge that this rule is applied only when the complaint is that the zoning action denied the plaintiff substantive due process.

The essence of the court's opinion to which those arguments are directed is:

> "[The] requirement of *substantive* due process under the Fourteenth Amendment . . . is met if there was any conceivable rational basis for the zoning decision." (emphasis added).

780 F.2d at 477, App. 5a.

The effect of this opinion is to make it possible to dispose of a case quickly when a plaintiff's only real complaint is that a local zoning board did not make the zoning rulings that plaintiff wanted. As soon as it is established beyond question that there is a conceivable rational basis for the board's decision review of the factual basis for that decision ends. The claim of denial of substantive due process can then be disposed of without further waste of the Court's time.

This result the Court reaches by characterizing the ZBA's actions as "quasi-legislative", and holding that the Court must treat the factual basis for the ZBA's action the same as the factual basis for state legislation is treated. That is, if it appears that there is any rational basis for the legislative action the Court's inquiry into the adequacy of the factual basis for the legislation ends.

Petitioners assert that the Court is wrong to treat a ZBA decision like a legislative act because the state of Texas has said ZBA actions are quasi-judicial. The Court's reply is:

> That a state may choose to make a legislative decision by a process that resembles adjudication is not our immediate concern. [footnote omitted]. Our question is whether anything in the fourteenth amendment requires it do so. We have consistently said "no" to that question and we do so again today.

780 F.2d at 481-482 (App. 15a-16a)

The Court acknowledges that there is a school of thought that maintains that when a property right is denied, the plaintiff is entitled to have the factual basis for the board's action reviewed as rational, *vel non,* on the

basis of the reasons stated by the board for the action. While it disagrees with that principle, the Court points out that the application of it would not bring a different result in this case.

2. The Opinion For The En Banc Court Is Correct.

Respondents submit that this Court should not disturb the *en banc* court's opinion because that opinion properly states the law.

The principle that federal courts will set aside a zoning action on a complaint that it takes property without due process of law, i.e., that it denies the plaintiff *substantive* due process, only if the action of the zoning authority is arbitrary and capricious is well established *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). That principle is not questioned in this case. The only thing that petitioners question is the manner in which the Court's opinion limits the extent to which a federal court may review the facts to determine whether the body which took the zoning action acted arbitrarily or capriciously.

One aspect of the Court's opinion which Petitioners seem to ignore is that the Court's opinion makes it clear the limitation on review resulting from its opinion applies only when the claim is denial of *substantive* due process. The limitation does not apply when there is a claim that procedural due process has been denied, or that any other constitutional or federally protected right has

been violated. Near the beginning of its opinion the Court indicates the limited scope of its opinion by saying that it applies only "In the absence of invidious discrimination, suspect classifying criteria or infringement of fundamental interest, . . .", 780 F.2d at 477 (Pet. 5a).

The Court's opinion also makes it clear that factual review would not be so stringently limited if the complaint should be that procedural due process was denied. In such cases, the opinion says, it would be proper for the Court to require the zoning board to articulate the basis for its action so that a court could determine whether the action taken did in fact have a rational basis.

Respondents submit that this Court should deny certiorari. The opinion of the Court below does not affect the basic legal principle. All it does is make available summary judgment, dismissal on the pleadings and possibly other procedures for prompt disposal of cases in which the plaintiffs only real contention is that on the facts the zoning board should have reached a different result.

Petitioners' contention that it is error for the Court to reach this result by characterizing the action of the ZBA as quasi-legislative because Texas courts have said that ZBA's actions are quasi-judicial, is without merit. It is true that the opinion from a Court of Civil Appeals cited by Petitioners, *Board of Adjustment of City of San Antonio v. Willie,* 511 S.W.2d 591 (Tex.Civ.App., San Antonio, 1974, writ ref'd n.r.e.) describes the ZBA function as quasi-judicial. However, under the interpretation by the Texas Supreme Court of the Texas Zoning Statutes, the extent to which Courts can review the factual basis

for a ZBA's action is less than that allowed in a judicial proceeding and close to that described by the Court below as that given by courts to legislative acts. The Texas Supreme Court has ruled that a ZBA's decision cannot be set aside by a reviewing Court, even if that Court believes that the evidence is overwhelming in favor of granting what the ZBA denied, unless it finds that the ZBA abused its discretion. *City of San Angelo v. Boehme,* 144 Tex. 281, 190 S.W.2d 67 (1945). Fairly recently that Court made a particular point of emphasizing that a statement by a court of civil appeals that review of a ZBA's action should be under the substantial evidence rule is wrong citing *Boehme* as stating the proper rule. *Nu-Way Emulsions, Inc. v. City of Dalworthington Gardens,* 617 S.W.2d 188 (Tex. 1981).

Under Texas law the action of a ZBA is an integral part of the zoning procedure which permits the granting of relief from unnecessary hardships without changing the zoning ordinance. It is not materially different from the action of a city council when the council changes, or refuses to change, the zoning classification of a particular piece of property, which is unquestionably a legislative action. See e.g. *City of Arlington Heights v. Metropoliton Housing Development Corp., supra; Bennett v. City of Slidell,* 697 F.2d 657 (5th Cir. 1983), aff'd in part and reversed on other points 728 F.2d 762, (*en banc* 1984), reh. den'd 735 F.2d 861 (*en banc* 1984), *cert. den'd.* 105 S. Ct. 3249, 87 L.Ed.2d 612.

The essential question is the nature of the decisional process. Is the decision to be made only on evidence produced before the body? If so, a review to determine

whether that evidence is adequate may be appropriate. Or is the decision to be made, as ZBA decisions are, on consideration of information furnished by the parties along with other information from other sources, including the general background knowledge of the board members, and involving evaluation of policy considerations by the board members? As this Court said in a case involving a zoning action on a single piece of property (where the claim that the action was invidiously discriminatory was not established):

> In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations, that courts refrain from reviewing the merits of their decisions absent a showing of arbitrariness or irrationality.

Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, 429 U.S. at 265, 97 S.Ct. at 563.

In another case arising from denial of a liquor license in which a provision of the state statute was held to violate the constitutional requirement for separation of church and state this Court said:

> The zoning function is traditionally a governmental task requiring the "balancing [of] numerous competing considerations," and courts should properly "refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality."

Larkin v. Grendel's Den, Inc., supra, at 459 U.S. 121, 103 S.Ct. at 509.

Respondents submit that these statements are just as applicable to the action of a ZBA passing on a request for a variance as they are to a city council passing on an appli-

cation for spot zoning, and that the Court of Appeals' opinion making that clear is a proper statement of the law that should not be disturbed by this Court.

3. There Is No Material Conflict Between The Circuits.

The petitioners assert that the opinion of the Court of Appeals *en banc* is in conflict with opinions from seven other circuits because those circuits "have held that a substantive due process claim can be made out based on arbitrary and capricious or illegal denial of a land use permit." Respondents submit that neither that statement nor the cases cited in support of it establish the existence of any material conflict.

The opinion for the Court below clearly recognizes that if it is established that the action of a ZBA (or any other zoning authority) which takes property from a claimant is arbitrary or capricious, that claimant has a right of action for denial of substantive due process. The opinion for the Court spells out the limit to which the courts may go in reviewing the facts to determine whether the zoning action was arbitrary or capricious, but that does not show a conflict. In none of the cases cited by petitioners is there any discussion of the extent to which the factual basis for the zoning board's decision will be reviewed by the Courts which conflicts with the principle the Court adopts.

Rogin v. Bensalem Township, 616 F.2d 680 (3rd Cir. 1980), *cert. den'd sub nom. Mark-Garner Associates v. Bensalem Township,* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981), affirmed dismissal of the plaintiff's action on the pleadings. *Scott v. Greenville County,* 716

F.2d 1409 (4th Cir. 1983) is not a decision on substantive due process. It involved a question of whether racial discrimination was a basis for the zoning action. *Wilkerson v. Johnson,* 699 F.2d 325 (6th Cir. 1983) is not a land use case. It deals with denial of a barber's license. It is not a substantive due process case. The claim was that the official who caused the license to be denied had a personal interest in seeing that that plaintiff was not licensed.

Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983) is similar to the instant case in that the Seventh Circuit affirmed a summary judgment against the plaintiff. There was no indication that there should be any further examination of the facts by the district court. The opinion includes the statement found in a number of other cases, "It is not the function of federal district courts to serve as zoning appeal boards." *Id.* at 1003.

In *Southern Cooperative Development Fund v. Driggers,* 696 F.2d 1347 (11th Cir.), *cert. den'd,* 463 U.S. 1208 (1983), a substantive due process claim was recognized, but the point at which the inquiry into the factual basis for the action would have ceased under the instant case was never reached. There was never any showing of a valid basis for the zoning agency's action. *Shenk v. Zoning Commission,* 142 App. D.C. 267, 440 F.2d 295 (D.C. Cir. 1971) affirmed a finding by the district court that denial of a request for a change of the zoning classification was arbitrary and capricious. It was, however, in the context of affirming a mandatory injunction to require the commission to change the zoning classification on evidence that included a recommendation by the zoning advisory counsel that such a change be made because eleven similar parcels

had been so rezoned. The following statement from the court's opinion, far from indicating a conflict, is substantially the same position as that set forth in the opinion for the Court below in the instant case:

> True, the zoning commission, a quasi-legislative body, is not required to make findings of fact, and its actions are entitled to a presumption of validity; but when a complaint makes a factual showing indicating that one of its actions is arbitrary, that action cannot be sustained unless the commission puts forward, *or the court is otherwise able to discern,* some basis in fact and law to justify the action as consistent with reasonableness. (emphasis added).

440 F.2d at 297-298.

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) did reverse a summary judgment in favor of the city against the landowner denied a building permit and order consideration of a claim which was characterized as a claim for denial of substantive due process. There was considered as a part of that claim, however, what was actually a procedural due process claim. That was the assertion that the building permit had been denied because landowners refused to comply with an illegal demand that they convey a right of way to the zoning administrator for the city. There was no discussion of the extent of factual review to be given.

4. Petitioners Were Not Denied A Property Right.

The opinion for the Court says "Deprivation by the state of a protected interest in life, liberty or property is prerequisite to a claim for denial of due process. . . . It is not at all clear that the state has deprived Shelton and

Jones of such a property right." 480 F.2d at 479 (App. 9a)

This, apparently, is a reaction to Respondent's contention citing *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) and *Agins v. City of Tiburon,* 447 U.S. 225 (1980) that a variance is not property so that regardless of whether or not due process was afforded them, Petitioners would not have a valid claim under 42 U.S.C. § 1983.

The Court of Appeals avoided dealing with that problem by holding that it was clear that Petitioners were not denied due process. However, if this Court should grant certiorari, it would have to deal, on the record in this case, with the question of whether a variance, or a procedure by which the petitioners could seek one, is "property".

5. The Opinion Of The Court Below Shows That It Reached The Proper Result Even If Its Principal Reasoning Is Not Endorsed.

Even if this Court should not accept the Court of Appeals' rationale that factual review of the basis for its action is to be limited because the ZBA's action is quasi-legislative, the Court's opinion makes it clear that affirmance of the summary judgment was proper. That is done by the portion of the opinion showing that review on the basis of requiring the ZBA to articulate the basis for its decision would result in affirmance of the District Court's action because the records showed that the existence of serious traffic problems in Northgate was unquestioned, and the ZBA members who voted against granting Peti-

tioners the variances they sought had a belief based on reasonable grounds that granting the variances would make that condition worse.

6. The Court's Judgment Was Proper And Required For Reasons Not Discussed In Its Opinion.

A. The Individual Defendants Are Immune From Personal Liability.

Near the end of its opinion the court states "Our holding makes it unnecessary to address defendants' claim of immunity under *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)." (780 F.2d at 485; App. 24a.) That refers to the contentions of the individual respondents, raised in the district court and strongly urged on the Court of Appeals in a contention that the summary judgment for them in their individual capacities should be affirmed, that petitioner cannot recover against them individually because there was nothing to indicate that they did anything other than perform their official duties in good faith and in a proper manner. They are, therefore, entitled to the "limited or good faith immunity" afforded to all government employees.

The only contention that any of the individual respondents did not act entirely properly was the contention that respondent E. Murl Bailey should have recused himself because he was a member of a church that was opposed to the granting of the variance and was personally biased gainst petitioners. The District Court found, and both the panel opinion and the opinion for the Court *en banc* affirmed the finding, that there was no basis for the contention that Bailey was biased against petitioners, and

the fact that he was a member of the church which opposed the granting of the variances was not a violation of petitioners' rights to procedural due process. Consequently, even if this Court should consider that the rationale of the Court of Appeals for affirming the summary judgment is not acceptable, the summary judgment for the individual defendants would have to be affirmed because they are immune from personal liability for their good faith actions in their official capacities. *Harlow v. Fitzgerald, supra, Mitchell v. Forsyth,* — U.S. —, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). See also *K. Pearlman,* SECTION 1983 AND THE LIABILITY OF LOCAL OFFICIALS FOR LAND USE DECISIONS, 23 Urban Law Journal 57 (1982).

B. The City Cannot Be Held Liable For Torts Of The ZBA.

A major contention in the Suggestion for Rehearing En Banc and in the brief of respondents for the *en banc* hearing was that the panel's opinion was contrary to this Court's holdings in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and the interpretations of it in *Bennett v. City of Slidell,* 728 F.2d 726 (5th Cir. *en banc*), *reh. den'd,* 735 F.2d 861 (5th Cir. *en banc* 1984) *cert. den'd,* 105 S.Ct. 3249, 87 L.Ed.2d 612, because the ZBA's action was not in execution of a city policy, and the ZBA had no authority to make policy for the City.

It is submitted that unless this Court departs from the principle established in *Monell, supra,* or goes well beyond the standards for determining who is a policy-

maker for a city indicated in *Pembaur v. City of Cincinnati*, — U.S. —, 106 S.Ct. 1292 (1986), the court would have to affirm the summary judgment in favor of the City. Even if it should somehow find that the ZBA committed a constitutional tort, the City would not be held liable for it.

———o———

CONCLUSION

The court should deny the application for certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-2044

FRED SHELTON, III, et al.,

Plaintiffs,

vs.

CITY OF COLLEGE STATION, et al.,

Defendants.

JUDGMENT

The Motion for Summary Judgment filed by the Defendants in this action came on for hearing before the Court on October 14, 1983. The Court having considered the Motions, briefs and factual data submitted in support of their motion by the Defendants, and the response, briefs and factual data submitted in opposition by the Plaintiffs, and the Court having heard the arguments of counsel and being of the opinion that such motion should be granted, announced from the bench its findings of fact and conclusions of law.

And the Court, having considered the Motion of Defendants' subsequently filed that they be allowed a reasonable attorney's fee to be taxed as costs and paid by Plaintiffs, is of the opinion that the applicable legal standards as set forth in *Hughes v. Rowe*, 449 U.S. 5 (1980) and cases cited therein have not been met, and

therefore Defendants are not entitled to recover attorney's fees.

It is, therefore, ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED, and that Plaintiffs take nothing in their action against Defendants. It is further

ORDERED, ADJUDGED, and DECREED that the Defendants have and recover from the Plaintiffs their costs, not to include attorney's fees.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 19th day of December, 1983.

/s/ Norman W. Black
UNITED STATES
DISTRICT JUDGE